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REPORTS

OF

1889

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

By FRANCIS M. DICE,
OFFICIAL REPORTER.

VOL. 99,

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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. ALLEN ZOLLARS.*†
HON. WILLIAM E. NIBLACK.†
HON. GEORGE V. HOWK.†
HON. BYRON K. ELLIOTT.‡
HON. EDWIN P. HAMMOND.§
HON. JOSEPH A. S. MITCHELL.||

*Chief Justice at the November Term, 1884.

†Term of office commenced January 1st, 1883.

‡Term of office commenced January 3d, 1881.

§Appointed May 14th, 1883.

||Term of office commenced January 6th, 1885.

SUPREME COURT COMMISSIONERS

OF THE

STATE OF INDIANA,

DURING THE TIME OF THESE REPORTS.

HON. GEORGE A. BICKNELL.*†

HON. WILLIAM M. FRANKLIN.†

HON. JAMES I. BEST.†

HON. JAMES B. BLACK.‡

HON. WALPOLE G. COLERICK.§

* Chief Commissioner.

† Appointed April 27th, 1881.

‡ Appointed May 29th, 1882.

§ Appointed November 9th, 1883.

OFFICERS
OF THE
SUPREME COURT.

CLERK,
SIMON P. SHEERIN.

SHERIFF,
JAMES ELDER.

LIBRARIAN,
CHARLES E. COX.

C A S E S
 ARGUED AND DETERMINED
 IN THE
 SUPREME COURT OF JUDICATURE
 OF THE
 STATE OF INDIANA,
 AT INDIANAPOLIS, NOVEMBER TERM, 1884, IN THE SIXTY-
 NINTH YEAR OF THE STATE.

No. 11,450.

CAYLOR v. ROE.

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99	1
136	374

MARRIAGE CONTRACT.—*Statute of Frauds.*—A simple contract of marriage is not within the statute of frauds, and hence need not be in writing.

SAME.—*Antenuptial Contract.*—Antenuptial contracts, in consideration of marriage, or in relation to real estate, are within the statute of frauds, and must be in writing to be enforced.

SAME.—There can be no recovery for the breach of a contract, if any portion of it is within the statute of frauds.

SAME.—At the time of entering into a verbal contract of marriage, and as the condition upon which it was entered into, and in consideration of the contemplated marriage, the parties orally agreed that in lieu of the interest in his estate which she would have as his wife, she should accept certain real estate and \$1,000, which contract he agreed to have reduced to writing, and submitted for her approval and signature before the marriage.

Held, that the agreement constituted one entire contract, the portion in relation to the marriage settlement being a condition, and that, as the contract was not in writing, no action can be maintained upon it.

STATUTE OF FRAUDS.—*Refusal to Reduce Contract to Writing.*—The statute of frauds can not be used to cover the perpetration of a fraud, but the simple refusal of a party to have the contract reduced to writing is not such a fraud as takes it out of the statute.

SAME.—*Pleading.*—The facts constituting fraud must be pleaded.

From the Randolph Circuit Court.

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E. L. Watson, J. S. Engle, M. B. Miller and J. E. Neff, for appellant.

W. A. Thompson and J. W. Thompson, for appellee.

ZOLLARS, C. J.—Appellee recovered a judgment below for the breach of a marriage contract. The only question made here by appellant is as to the sufficiency of the second and third paragraphs of the complaint, to which a demurrer was overruled.

It is averred in the second paragraph, that, on the 30th day of June, 1882, the parties entered into a contract of marriage, to be consummated in the following July. The day in July is not named. Following these statements are the further allegations that at the time of entering into the marriage contract, appellant represented that he was a man advanced in years and of great wealth; that he had been married—had living children of that marriage—and that the marriage contract here was upon the *condition* that appellee should enter into a written antenuptial contract, by which she should accept certain described real estate and \$1,000 in money in lieu of the interest she would have as appellant's wife in and to his estate, both real and personal, at the time of his death.

It is further averred that at that time it was further agreed that the written contract, when drawn up, should be submitted to a brother of appellee for approval before being signed by her. It is further averred, that from the making of the marriage contract until the bringing of this action, appellee has been ready and willing to enter into said written agreement, and to marry appellant, and that in July, 1882, the month agreed upon for the marriage, appellant refused, and has ever since refused, to marry her.

In the third paragraph the contract of marriage is set out as in the second. Following this, it is averred that at the time of entering into this contract, and as the *condition* upon which it was entered into, and in *consideration* of the contemplated marriage, the parties made an antenuptial contract, which con-

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tract appellant was to cause to be reduced to writing, and presented to appellee and her brother for their approval, and that it should be signed by the parties before the marriage. The terms of the marriage settlement here set out are, in the main, the same as stated in the second paragraph.

It is averred further, that with the intent to cheat and defraud appellee, appellant caused a contract to be reduced to writing (a copy of which is set out) and submitted it to appellee, which she declined to execute, because it was not the contract agreed upon, but another and different one, which, if executed, would have resulted in a fraud upon her rights under the antenuptial contract. It is further averred that the appellee has all the while been ready and willing to execute the contract as agreed upon, and to marry appellant, and that he has neglected and refused to have the real contract reduced to writing and executed, and has refused to marry her.

The contention of appellant is that the facts set up in each paragraph show that the agreement to marry, and the agreement in relation to the marriage settlement, make but one entire contract, and that as it is not in writing, under the statute of frauds, damages can not be recovered for a breach of it.

The contention on the part of appellee is that the facts show that two contracts were made, the contract of marriage being the principal contract, and that in relation to the property being collateral to it, and that hence damages may be recovered upon the breach of the marriage contract without reference to the other contract. We think that the position of appellant is the only tenable one.

It is averred in the second paragraph, as we have seen, that the marriage contract was upon the *condition* that appellee should execute the agreement in relation to the property, by which she should relinquish certain rights and acquire others. This agreement shows a conditional contract of marriage. The marriage was not to take place except upon the *condition* named. It is said in 2 Parsons on Contracts (7th ed.), p. 526, that "Mutual contracts sometimes contain a condition, the

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breach of which by one party permits the other to throw the contract up, and consider it as altogether null."

A contract to marry, like most other contracts, may be on condition. 1 Wait's Actions and Defenses, p. 724, and cases cited.

It could not be contended, with reason, that appellee, while asserting that the marriage contract was upon the *condition* that she should execute the contract in relation to the property, might refuse to execute that contract, and still insist upon damages because appellant refused to consummate the marriage. Such a refusal upon her part would, clearly, relieve him from all obligation and liability upon the contract of marriage. His promise of marriage was upon a condition; his contract was a conditional contract. To separate the condition from the contract of marriage would be to destroy that contract; and to allow damages for the breach of the contract of marriage, without reference to the *condition* upon which that contract rests, would be to hold appellant liable upon a contract very essentially different from the contract agreed upon by the parties.

At section 140, in Browne on the Statute of Frauds, it is said: "It is clear that if the several stipulations are so interdependent that the parties can not reasonably be considered to have contracted but with a view to the performance of the whole, or that a distinct engagement as to any one stipulation can not be fairly and reasonably extracted from the transaction, no recovery can be had upon it, however clear of the statute of frauds it may be, or whatever be the form of action employed. The engagement in such case is said to be entire."

This furnishes a very good test as to whether or not a contract of different parts and items should be regarded as one entire contract. Under this test, the averments in each paragraph of the complaint show a single contract only, but of different items. It is very evident that the parties here contracted with a view to the performance of all of the stipulations, and not a part only.

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Either party may insist upon the performance of the *condition*, if called upon to perform the contract. Appellant has the right to insist upon the performance of the *condition*, before he shall be made to respond in damages.

Appellee shows by the second paragraph of the complaint, that she has not performed that *condition*; and while she avers that she has been ready and willing to execute the contract in relation to the property, she does not undertake to furnish an excuse for her failure to do so, unless the statement that appellant has refused to marry her is a sufficient excuse. It is averred that the contract was to be reduced to writing, but there is no averment as to whose duty it was to have this done.

We hold that the agreements, as to the marriage and the property, constitute but one unwritten, conditional contract of marriage. See *Henry v. Henry*, 27 Ohio St. 121. There can be no recovery for a breach of this contract, if any portion of it is within the statute of frauds. *Rainbolt v. East*, 56 Ind. 538 (26 Am. R. 40); *Frank v. Miller*, 38 Md. 450; *Fuller v. Reed*, 38 Cal. 99; Browne Stat. Frauds, section 140, *et seq.*

It is well settled that simple contracts of marriage are not within the statute of frauds, and hence need not be in writing. *Short v. Stotts*, 58 Ind. 29; 2 Parsons Cont. (7th ed.) 73, and cases cited.

It is well settled too, that antenuptial contracts in consideration of marriage, or in relation to real estate, are within the statute of frauds, and hence, unless they are in writing, no action can be maintained upon them, either in the way of enforcing them, or for damages for a breach of them. Section 4904, R. S. 1881; *Flenner v. Flenner*, 29 Ind. 564; *Brenner v. Brenner*, 48 Ind. 262; *Rainbolt v. East*, *supra*; 2 Parsons Cont. (7th ed.) 71. See, also, *Hackleman v. Board*, *etc.*, 94 Ind. 36.

Properly interpreted, the second paragraph is, that a part of the contract of marriage was the further agreement that appellee should have certain specific real estate, and \$1,000

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in money, and no further portion of appellant's estate, and that this agreement should be reduced to writing.

If there were no averments as to the agreement being reduced to writing, it would be a simple case of an oral agreement in relation to real estate, which would be clearly within the statute of frauds.

The averment that the contract was to be reduced to writing and executed by appellee, we think, does not take the case out of the statute, and hence we conclude that the paragraph is insufficient as against the demurrer directed to it. Our reasons for so holding will further appear in the examination of the third paragraph of the complaint. That paragraph, like the second but in more explicit terms, avers that as the *condition* upon which the marriage contract was entered into, there was a verbal antenuptial contract in relation to the property that appellee was to receive in lieu of her prospective interest in appellant's estate; appellant was to have that verbal contract reduced to writing, and that, with intent to cheat and defraud appellee, he refused to do so, and substituted a different contract.

While fraud is charged upon appellant in not having the real antenuptial contract reduced to writing, no facts are stated showing any such fraud as the law recognizes in such a case. The facts stated show simply that appellant neglected and refused to have the real verbal contract reduced to writing and presented to appellee.

The statute of frauds is intended to be a shield to protect against fraud, and hence can not be used as a cover to protect the perpetration of fraud. *Teague v. Fowler*, 56 Ind. 569; *Arnold v. Cord*, 16 Ind. 177; *Gwaltney v. Wheeler*, 26 Ind. 415; *Butcher v. Stultz*, 60 Ind. 170; *Hunt v. Elliott*, 80 Ind. 245 (41 Am. R. 794); *Waterman Spe. Perf. Con.*, section 248.

In accordance with this general doctrine, it has been held that a parol contract within the statute of frauds will be enforced against a party who fraudulently prevents the contract being reduced to writing. At sections 248 and 249 of Water-

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man on Specific Performance of Contracts, the author, in speaking of the statute of frauds, says: "There remain to be considered certain exceptions in which a court of equity will enforce parol contracts, notwithstanding the statute. These are: 1st, where a written agreement has been prevented by fraud." "If the reduction of the contract to writing was prevented by the fraud of one of the parties, specific performance will be decreed, upon proof of the parol agreement and of the fraud. 'The rule that fraud takes the case out of the statute is too well settled to admit of doubt; and for the purpose of showing that fraud has been committed, or is being attempted, parol evidence has always been held to be admissible.'"

In the case of *Arnold v. Cord*, 16 Ind. 177, this court, in speaking of the statute of frauds, and fraud in preventing the reduction of contracts to writing, quoted from Hill on Trustees, side p. 152, as follows: "The court in all these cases acts upon the principle that the instruments which would have been executed, or would have existed, but for the fraud, are to be treated as if actually executed and existing."

In the case of *Teague v. Fowler*, 56 Ind. 569, the court quoted approvingly from Browne on the Statute of Frauds the following, in relation to a case cited by the author: "There was a verbal agreement for an absolute conveyance of land, and for a defeasance to be executed by the grantee; but he, having obtained the conveyance, refused to execute the defeasance, and relied upon the statute; but his plea was overruled, and he was compelled to execute according to his agreement."

This same general doctrine has been approved in many other cases in this court, but in none of them, nor in the above authorities, has it been held that the simple failure or refusal to reduce a verbal contract to writing, unaccompanied by elements of estoppel, or other circumstances invoking the equitable powers of the court, is such a fraud as will authorize and justify the courts in excepting the contract from the operation of the statute of frauds.

In Browne on the Statute of Frauds, at section 439, it is

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said: "The fraud against which equity will relieve, notwithstanding the statute, is not the mere moral wrong of repudiating a contract actually entered into, which, by reason of the statute, a party is not bound to perform for want of its being in writing. * * * But where there is no fraud, only relying upon the honor, word, or promise of the defendant, the statute making those promises void, equity will not interfere."

In Reed on the Statute of Frauds, at section 479, it is said that there are some American authorities which say that fraud in preventing the memorandum being made will take the case out of the statute. It is further said in the same section, that "According to the tendency of modern decisions, mistake, or even fraud, in not putting the contract in writing, will not create an exception to the statute of frauds. * * * Refusing to make the memorandum is not the same thing as actively preventing a memorandum being made, which would otherwise have been executed, and in an extreme case the latter act might make an exception to the statute of frauds; how the former ever can it is difficult to see." See, also, *Box v. Stanford*, 13 Sm. & M. 93.

The holding of the court in the case of *Bozza v. Rowe*, 30 Ill. 198, is summed up in the syllabus in the statement that "The refusal, by a vendor, to sign a memorandum in writing, is not a fraud, so as to take the case out of the operation of the statute of frauds."

The doctrine of the case of *Glass v. Hulbert*, 102 Mass. 24, is correctly summed up in section 444a of Browne on the Statute of Frauds, as follows: "In *Glass v. Hulbert* the Supreme Court of Massachusetts, by WELLS, J., said that it makes no difference whether the want of a writing was accidental or intentional, and that so long as the effect of the fraud or mistake extends no further than to prevent the execution, or withhold from the other party written evidence of the agreement, it does not furnish ground for the court to disregard the statute, and enter into the investigation of the oral agreement for the purpose of enforcing it."

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The holding in the case of *Chase v. Fitz*, 132 Mass. 359, is correctly stated in the syllabus, as follows: "An oral agreement to execute an antenuptial contract is within the statute of frauds; and if an oral agreement to marry is dependent upon such an agreement, and a part of it, no action can be maintained upon it."

The contract of marriage in this case was connected with the agreement in relation to a marriage settlement, as in the case before us, and the claim was made that there was an agreement that the antenuptial contract should be reduced to writing. In speaking of this claim, the court said: "It would leave but little if anything of the statute of frauds to hold that a party might be mulcted in damages for refusing to execute in writing a verbal agreement which unless in writing is invalid under the statute of frauds. We therefore have no hesitation in determining that the defendant's testator entered into no valid engagement to marry, and that the marriage, if promised, was only one of a large series of stipulations and counter-stipulations dependent upon each other, and which required a writing for their validity."

The ruling of this court upon the point under examination is in accord with the foregoing authorities.

In the case of *Wilson v. Ray*, 13 Ind. 1, the court, by Mr. Justice WORDEN, said: "It can not readily be perceived how a fraudulent refusal to put the contract in writing can have the effect of putting it in writing. The object of the statute was to require written evidence of the terms of the contract, and thereby to prevent frauds and perjuries in establishing them by parol. The construction sought would not only defeat the object of the statute by permitting parol evidence of the contract, but would open the door to frauds and perjuries still wider, by permitting parol evidence of the fraud charged in refusing to put the contract in writing."

To hold that a party may recover, notwithstanding the statute of frauds, because the other party has neglected and refused to reduce the contract to writing, would be to hold,

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practically, that a verbal contract may be enforced, although within the statute.

Not to extend this opinion further, we are constrained to hold that each of the paragraphs of the complaint sets up one single and entire contract; that the portion in relation to the property settlement is within the statute of frauds; that the refusal on the part of appellant to reduce that portion of the contract to writing is not such a fraud as will take the case out of the statute; and that hence the contract of marriage, as set up in these paragraphs, can not be enforced, and the demurrer thereto should have been sustained. The verdict is based upon the entire complaint. When this is the case, and either of the paragraphs is bad, the judgment will be reversed. *Pennsylvania Co. v. Holderman*, 69 Ind. 18.

The judgment is reversed, with costs.

Filed Dec. 31, 1884.

No. 11,511.

THE CITY OF INDIANAPOLIS v. COOK.

NEGLIGENCE.—*Question of Law*.—The facts being found, negligence is a pure question of law to be decided by the court.

SAME.—*Verdict*.—*Special Finding of Facts*.—*Cities*.—*Street*.—*Sidewalk*.—Suit against a city for injury in consequence of an obstruction in a sidewalk. Answering interrogatories, the jury found the obstruction to have been a water-box 6 by 7½ inches, and 1½ inches above the level of the sidewalk; that the plaintiff had knowledge of it. The plaintiff, in the dark when it was difficult to see it, stumbled over it and was injured.

Held, that the defendant should have judgment, notwithstanding an adverse general verdict.

From the Superior Court of Marion County.

C. S. Denny and D. V. Burns, for appellant.

J. Coburn and W. Irvin, for appellee.

HAMMOND, J.—Action by the appellee against the appellant, the City of Indianapolis, Philip Reichwein, and the In-

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127	58

99	10
143	428

99	10
147	331

99	10
180	274

99	10
164	578

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dianapolis Water Company, for an injury resulting from an alleged obstruction in the sidewalk in front of the premises of said Reichwein. The defendants answered separately by the general denial. After submission to the jury for trial, appellee dismissed as to the water company. A verdict was returned for Reichwein, but in appellee's favor, against appellant; and with their general verdict the jury, in answer to interrogatories submitted by the court at the request of the parties, made a special finding of facts. Upon the facts thus found appellant moved for judgment in its favor notwithstanding the general verdict. This motion, and also appellant's motions for a *venire de novo* and for a new trial, were overruled. Questions as to the correctness of these rulings are properly presented.

The facts specially found by the jury, so far as they are material, were, in effect, as follows :

In the sidewalk in front of the premises of Reichwein, on Market street, in the city of Indianapolis, there was a water-box, six by seven and one-half inches in size, and extending one and a quarter inches above the level of the sidewalk. The appellee stumbled and fell over said water-box on the night of December 30th, 1881, receiving the injuries complained of in the present action. At the time of the accident it was dark and raining, and difficult for the appellee to see the water-box. She was at that time well acquainted with the condition and situation of the water-box, having for about sixty days prior thereto passed over the part of the sidewalk where it was located, as often as two or three times each day.

In an action like the present, the law is well settled that there can be no recovery if the plaintiff's negligence or want of care contributed in any way to the injury complained of. *Pennsylvania Co. v. Gallentine*, 77 Ind. 322, and authorities cited on p. 329. Negligence consists in the omission or commission of some act which a reasonable and careful man would, or would not, do. *Howe v. Young*, 16 Ind. 312.

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From the nature of the obstruction in question, with the appellee's knowledge of its condition and situation, it is manifest that with ordinary care she might have passed it, either to the right or to the left, or stepped over it, with safety. It seems that it was not so dark but that she could see the water-box, but if the darkness had been ever so great, care in providing a light, or in walking, would have avoided stumbling and falling over the alleged obstruction. We think that this was a case where knowledge, such as was possessed by appellee, of the existence of the defect or obstruction in the sidewalk which caused the injury, was conclusive of contributory negligence.

In *President, etc., v. Dusouchett*, 2 Ind. 586, it was said: "If a person knows there is an obstruction in a street, and he attempts to pass the place when, in consequence of the darkness of night, or of the rise of water over the street, he can not see the obstruction, he has no reason to complain of the injury he may receive on the occasion."

In *Riest v. City of Goshen*, 42 Ind. 339, which was an action to recover for an injury received in driving over a bridge, alleged to be "dangerous to all who should pass on the same," it was said: "The law is well settled, that if the plaintiff or his servant knew of the true condition of the bridge when the team and wagon were driven upon it, he can not, under such circumstances, recover."

In *Jonesboro, etc., Turnpike Co. v. Baldwin*, 57 Ind. 86, which was an action for an injury sustained from a defect in the defendant's road, it was held that the plaintiff's knowledge of such defect before driving into it precluded a recovery on the ground of contributory negligence.

In *Bruker v. Town of Covington*, 69 Ind. 33 (35 Am. R. 202), the following instruction to the jury was held to have been properly given: "1st. If the plaintiff knew the opening or cellar way was in the sidewalk, and he attempted to pass the place where it was, when, in consequence of the darkness of the night, he could not see it, he has no legal reason to complain

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of the injury he received on account of the fact that the opening or cellar way was there. In such cases he must be treated as having taken the risk upon himself, and this too although at the time the fact of the existence of the opening was not present to the plaintiff's mind."

As sustaining the foregoing cases, see also *Morford v. Woodworth*, 7 Ind. 83; *Board of Trustees, etc., v. Mayer*, 10 Ind. 400; *Wood v. Mears*, 12 Ind. 515; *Thompson v. Cincinnati, etc., R. R. Co.*, 54 Ind. 197; *Louisville, etc., R. R. Co. v. Schmidt*, 81 Ind. 264; *King v. Thompson*, 87 Pa. St. 365; S. C., 30 Am. R. 364; *Dill. Mun. Corp.* (3d ed.), sec. 1006.

There are recent decisions of this court to the effect that a person is not obliged to forego travel on a highway which he knows to be dangerous, but may proceed, and if he uses proper care and is injured, he may recover. But the care in such case to avoid injury must be in proportion to the danger he might encounter by reason of the defect or obstruction. *Toledo, etc., R. W. Co. v. Brannagan*, 75 Ind. 490; *City of Huntington v. Breen*, 77 Ind. 29; *Turner v. Buchanan*, 82 Ind. 147 (42 Am. R. 485); *Murphy v. City of Indianapolis*, 83 Ind. 76; *Wilson v. Trafalgar, etc., G. R. Co.*, 83 Ind. 326; *Henry County Turnpike Co. v. Jackson*, 86 Ind. 111 (44 Am. R. 274); *Town of Albion v. Hetrick*, 90 Ind. 545 (46 Am. R. 230); *Wilson v. Trafalgar, etc., G. R. Co.*, 93 Ind. 287. In *Toledo, etc., R. W. Co. v. Brannagan*, *supra*, this court said: "Knowledge that there is a defect in a highway, making it dangerous to attempt to travel upon it, does not of itself make it negligence to use the highway carefully and cautiously. Knowledge of the existence of a dangerous place does, however, make it incumbent upon the traveller to use care and caution proportionate to the danger which he knows lies in his way."

The decision of a court can properly have reference only to the case before it, and it is quite difficult, perhaps impossible, to formulate general principles that shall even control similar cases where the circumstances are not precisely the same. The appellee's knowledge of the situation and condition of the

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water-box prior to her injury did not *per se* make it negligence for her to attempt to pass over that part of the sidewalk where it was located; but it did impose upon her the duty of using care and caution in proportion to the danger. Such care and caution as she was thus required to exercise would obviously have saved her from harm. As appellant's counsel say in their brief: "No sidewalk is so narrow that an obstruction six by seven and one-half inches may not be avoided, if proper care is observed. There is no one who can walk, but that may, in the exercise of proper care, step over an obstruction one and one-fourth inches high." The rule to be gathered from the authorities is, we think, that where it is clearly apparent that notice of a danger is sufficient with the use of care to avoid an injury therefrom, it must be held that if an injury does result from it, there can be no recovery, for the reason that the plaintiff must be held guilty of contributory negligence.

"The question of negligence is one of mingled law and fact, to be decided as a question of law by the court when the facts are undisputed or conclusively proved, but not to be withdrawn from the jury when the facts are disputed and the evidence is conflicting." *Gagg v. Vetter*, 41 Ind. 228 (13 Am. R. 322). In *Toledo, etc., R. W. Co. v. Goddard*, 25 Ind. 185, it was said: "The question of negligence is ordinarily a mixed one of law and fact, but when the facts are found, then their legal consequences constitute purely a question of law for the court, and not for the jury." See, also, *Pittsburgh, etc., R. R. Co. v. Spencer*, 98 Ind. 186.

The jury, in the present case, in finding for the appellee in their general verdict, must have concluded that she was without negligence in receiving the injury complained of. But the facts specially found by them were in irreconcilable conflict with the conclusion reached in the general verdict, and, in such case, the special finding must control. R. S. 1881, section 547.

We would be reluctant to reach the conclusion we have, if,

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upon examining the evidence, it appeared to us even doubtful what the decision ought to be. But the evidence clearly shows that the obstruction, and the knowledge by the appellee of its existence, were as stated in the special findings of the jury. It further clearly appears that the appellee used no care whatever to avoid the injury.

It is insisted by counsel for appellant that the obstruction in controversy was one for which the city would, in no event, be liable. Covering only six by seven and one-half inches of the sidewalk, and being only one and one-fourth inches above its surface, it is claimed that one exercising ordinary care in walking, even without notice of the existence of the water-box, could not have received an injury from it. A city is not an insurer against accidents upon its streets and sidewalks. It is simply required to keep its streets and sidewalks in a reasonably safe condition for persons travelling in the usual modes by day and night, and using ordinary care. A man may stumble and fall anywhere, in a house or in a street, but, because he happens to fall in the street, it follows by no means that the city is responsible for the injury he receives. There are slight inequalities in sidewalks, and other trifling defects and obstructions against which one may possibly strike his foot and fall, but if injury might be avoided by the use of such care and caution as every reasonably prudent person ought to exercise for his own safety, the city would not be liable. *Higert v. City of Greencastle*, 43 Ind. 574; *Raymond v. City of Lowell*, 6 Cush. 524; *Cornman v. Eastern Counties R. W. Co.*, 4 H. & N. 781; *City of Aurora v. Pulfer*, 56 Ill. 270; *Ring v. City of Cohoes*, 77 N. Y. 83 (33 Am. R. 574); *Macomber v. City of Taunton*, 100 Mass. 255; *Dill. Mun. Corp.*, section 1017.

The present case, however, does not require us to decide whether an injury from the obstruction in question could, in any case, be the foundation for an action against the city. We place our decision solely upon the appellee's contributory

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negligence, as shown in her previous knowledge of the location and condition of the water-box; this, of itself, in the present case, being conclusive against her right to recover.

Reversed, with costs, with direction to the court below to sustain appellant's motion for judgment in its favor on the special findings.

Filed Dec. 16, 1884.

No. 8576.

THE PENNSYLVANIA COMPANY v. WHITLOCK.

NEGLIGENCE.—*Proximate Cause*.—*Fire*.—Where A. negligently, but accidentally, sets his own building on fire, and while it is burning the fire is, by force of the wind, carried to B.'s building, which is thereby destroyed, A. is not liable to B., the wind being an independent intervening cause, and, therefore, A.'s negligence is not the proximate cause of the injury.

From the Porter Circuit Court.

J. Brackenridge and *J. R. Carey*, for appellant.

T. J. Merrifield and *J. D. McLaren*, for appellee.

NIBLACK, J.—Complaint by Robert Whitlock against the Pennsylvania Company in two paragraphs.

The first paragraph charged that the defendant was a railroad corporation, and as such was, and had been for the five years then immediately preceding, operating, managing and controlling the Pittsburgh, Fort Wayne and Chicago Railway, running through the county of Laporte, together with all the depots, station-houses and other property appertaining to said railway; that for a long time prior to the 9th day of January, 1875, the defendant kept, maintained and controlled a station-house on the line of said railway at the town of Wanatah, in said county of Laporte, for the accommodation of passengers and for convenience in the transportation of freight, using, also, a part of the same for the ticket and telegraph offices; that said station-house was, during all the time named, under

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196	234
99	16
131	34
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131	34
158	424

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the immediate charge of an agent and servant of the defendant, who caused the same to be heated with a large wood-burning stove, the pipe of which ran into a flue in the building which had been so carelessly, negligently and unskilfully constructed as not to prevent the escape of sparks and flames through the sides thereof, and which was, and had been, maintained in such an unsafe and dilapidated condition as to greatly endanger such station-house and property adjacent thereto, of all which the defendant had notice; that the defendant, so having notice of the unsafe and dangerous condition of said flue, refused to repair the same; that the plaintiff was, at the time herein above stated, the owner, and in the actual occupancy, of a large two-story frame hotel building, in said town of Wanatah, of the value of \$6,000, and of furniture and other personal property used in said hotel building of the value of \$2,000; that said hotel building was next and adjacent to the southwest corner of said station-house, with only a small, as well as a clear and unobstructed space between the two buildings; that, on said 9th day of January, 1875, said station-house caught fire from and through the cracked, unsafe and dilapidated flue so constructed therein, as above set forth, and was thereby totally consumed; that while said station-house was burning, fire was communicated therefrom by the wind to the hotel building, whereby said latter building, with the furniture and other personal property therein contained, was also burned up, and wholly destroyed, without any fault or negligence on the part of the plaintiff.

The second paragraph contained substantially the same facts as the first, except that it charged that the defendant's servants and employees were in the habit of pouring oil on the kindlings and wood put in the stove as fuel, thus making quickly hot and blazing fires, which habit was fully known to the defendant, and that, on the morning of the said 9th day of January, 1875, the defendant, by its servants and employees, negligently and carelessly made a quick, hot and

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blazing fire in the stove in the station-house by pouring oil over the kindlings and wood put therein, from which fire sparks and flames escaped through the cracks in the flue into which the stove-pipe entered, thus setting the station-house on fire and burning it up, and that while the station-house was so burning up, fire was blown by the wind from the same to, on and against the plaintiff's hotel building, setting fire to it, also, in that way, and consuming it, and the furniture and other personal property used therein.

Demurrers were severally overruled to both paragraphs of the complaint, and, issue being joined, the plaintiff obtained a verdict and judgment against the defendant for \$3,000.

In the natural order of objections made to the proceedings below, the question of the sufficiency of the complaint is first presented. It is claimed that the facts averred in both paragraphs of the complaint disclosed only a case of the accidental burning of the station-house, and of the accidental spread of fire to the hotel building, from which it must be inferred that the negligence charged was not the proximate cause of the injury complained of.

It is not easy at all times to determine what are really proximate and what are only remote damages. That we must so use our own as not to injure another, is an ancient and axiomatic rule of the law, but it is often found to be very difficult and perplexing to make a just and reasonable application of this most excellent general rule. There must be some limit to the extent of liability for injuries even in cases of the grossest and most inexcusable negligence. In close cases, however, it is frequently very hard to determine just where the line between liability and non-liability for seeming negligence ought to be drawn.

The damages for which a party is, and upon principle ought to be liable, are those which are the natural or necessary consequences of his wrongful act. But where some other agency intervenes and extends the injurious effects of the wrongful act beyond the range of its natural or necessary consequences,

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and beyond what could ordinarily have been anticipated, the party originally at fault is not responsible for such additional injurious effects.

As incidental to the improvements of the age in which we live, and to the vast amount of combustible material in daily use by the people of this country, injuries by fire have been the subject of much judicial investigation within the past few years, and have become a subject about which much has been recently said and written. As applicable, however, to the particular question now before us, the authorities are not numerous, and some of the cases which have been brought to our attention are not in harmony with each other. This want of harmony is, however, mainly between the older cases on the one side, and the more modern cases on the other, the tendency all the while having been towards either a non-liability, or a more restricted liability, for merely accidental fires.

By the common law of England, before the enactment of any statute on the subject, a person in whose house a fire originated, which afterwards spread to his neighbor's property and destroyed it, was compelled to make good his neighbor's loss by the fire. But by a statute of 6 Anne c. 31, amended and substantially re-enacted by another statute of 14 Geo. III. c. 78, sec. 86, it was provided "That no action, suit, or process whatever, shall be had, maintained or prosecuted, against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall, after the said twenty-fourth day of June, [1774] accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby; any law, usage, or custom, to the contrary notwithstanding."

Blackstone, in his commentaries, after referring to the ancient common law doctrine on the subject of accidental fires, says: "But now the common law is, in the former case, altered by statute 6 Ann., c. 3 [31], which ordains that no action shall be maintained against any, in whose house or chamber any fire shall accidentally begin; for their own loss is suffi-

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cient punishment for their own or their servant's carelessness." 1 Cooley's Blackst. Com. 431.

In the case of *Lansing v. Stone*, 37 Barb. 15, it was held that the common law of England on the subject of accidental fires, as modified by the statutes of 6 Anne and 14 Geo. III., *supra*, had become the common law of the State of New York, and, quoting Blackstone as above approvingly, further held that where a man's house or other building takes fire, even by his own or his servants' negligence, and the fire spreads to and consumes his neighbor's property, he can not be made liable for the latter's loss, upon the theory that the interest which a man has in preserving his own property ought to be considered a sufficient guaranty, as it is in fact the only one his neighbors have against his and his servants' negligence.

The case of *Ryan v. New York C. R. R. Co.*, 35 N. Y. 210, was a more recent New York case. The facts upon which that case rested were briefly, that the railroad company, either by the carelessness of its servants, or through the bad condition of one of its locomotives, set fire to one of its own wood-sheds in the city of Syracuse, which sheltered and contained a large quantity of wood. The plaintiff's house, standing at a distance of about one hundred and thirty feet from the shed, took fire from the sparks and heat thrown out by the burning shed and wood, and was thus entirely consumed. A considerable number of other houses and buildings were burned and destroyed by the spreading of the same fire. Upon proof of these facts the circuit court nonsuited the plaintiff, and the judgment was affirmed at the general term of the supreme court of the proper district. The cause was then taken to the Court of Appeals, where the judgment was again affirmed by the unanimous, as well as exhaustive, opinion of that court. The statutes of 6 Anne and 14 Geo. III., *supra*, were not referred to or relied upon in that opinion, but the conclusion reached was based upon the inference that the railroad company's negligence was only the remote, and hence not the proximate, cause of the plaintiff's loss.

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HUNT, J., delivering the opinion, and first giving some illustrations, said: "So if an engineer upon a steamboat or locomotive, in passing the house of A., so carelessly manages its machinery that the coals and sparks from its fires fall upon and consume the house of A., the railroad company or the steamboat proprietors are liable to pay the value of the property thus destroyed. (*Field v. N. Y. Central R. R.*, 32 N. Y. 339.) Thus far the law is settled and the principle is apparent. If, however, the fire communicates from the house of A. to that of B., and that is destroyed, is the negligent party liable for his loss? And if it spreads thence to the house of C., and thence to the house of D., and thence consecutively through the other houses, until it reaches and consumes the house of Z., is the party liable to pay the damages sustained by these twenty-four sufferers? The counsel for the plaintiff does not distinctly claim this, and I think it would not be seriously insisted that the sufferers could recover in such case. Where, then, is the principle upon which A. recovers and Z. fails?"

The answer which then followed to the inquiry thus suggested was, that in A.'s case the damages would be proximate, while in the case of Z. they would only be remote.

The case of *Pennsylvania R. R. Co. v. Kerr*, 62 Pa. St. 353 (1 Am. R. 431), was an action by Kerr against the company for the loss of his furniture in a hotel near the Pennsylvania railroad, which was destroyed by fire through the alleged negligence of the company's servants in running its locomotive. The fire was first communicated to a warehouse and from that to the hotel.

The verdict and judgment were in favor of the plaintiff, but, upon an appeal, the Supreme Court of Pennsylvania held that the damages were too remote, and, referring to, recognizing and approving the distinction observed between proximate and remote damages, in the case of *Ryan v. New York C. R. R. Co.*, *supra*, reversed the judgment. Weeks on *Damnum Absque Injuria*, at section 118, states the ac-

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cepted doctrine to be that where, by the negligence of another, a building was burned, and the fire spread to and destroyed an adjoining house, the negligence was considered too remote to give the owner of the latter house a remedy for his loss against the party by whose negligence the fire originated. He then quotes from the case of *Morrison v. Davis*, 20 Pa. St. 171, as sustaining that doctrine, the following: "There are often very small faults which are the occasion of the most serious and distressing consequences. Thus, a momentary act of carelessness set fire to a little straw, and that set fire to a house, and, by an extraordinary concurrence of very dry weather and high winds, with this fault, one-third of a city (Pittsburgh) was destroyed. Would it be right that this small act of carelessness should be charged with the whole value of the property consumed?" And, continuing, says it has also been asked, "Should the careless act of the woman who originated the great fire at Chicago make her liable in damages for all the losses that resulted therefrom?"

Field, in his work on the Law of Damages, at section 50, states the doctrine on the subject of spreading fires in substantially the same language used by Weeks, and given as above.

Cooley on Torts, at p. 76, says: "How far one may be chargeable with the spread of a fire negligently started by himself, is one that has attracted no little attention in judicial circles, and led to some difference of opinion. In New York it is held that while the culpable party would be liable to the owner of an adjoining house to which the fire had spread, he would not be liable to one to whose house the fire should spread from the burning of the first; the court apparently being more influenced in their decision by the fact that the opposite doctrine would subject to a liability against which no prudence could guard, and to meet which no private fortune would be adequate, than by a strict regard to the logic of cause and effect. In Pennsylvania the same conclusion has been reached, and from similar considerations. But a dif-

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ferent view prevails in England and most of the American States. The negligent fire is regarded as a unity: it reaches the last building as a direct and proximate result of the original negligence, just as a rolling stone put in motion down a hill, injuring several persons in succession, inflicts the last injury as a proximate result of the original force as directly as it does the first; though if it had been stopped on the way and started anew by another person, a new cause would have thus intervened back of which any subsequent injury could not have been traced. Proximity of cause has no necessary connection with contiguity of space or nearness in time."

The cases of *Ryan v. New York Cent. R. R. Co.*, *supra*, and *Pennsylvania Co. v. Kerr*, *supra*, are cited as sustaining the doctrine recognized in New York and Pennsylvania respectively, but the learned author expresses the opinion in a note that the weight of these cases is somewhat diminished by the more recent cases of *Oil Creek, etc.*, *R. W. Co. v. Keighron*, 74 Pa. St. 316, *Pennsylvania R. R. Co. v. Hope*, 80 Pa. St. 373 (21 Am. R. 100), *Webb v. Rome, etc.*, *R. R. Co.*, 49 N. Y. 420 (10 Am. R. 389), *Pollett v. Long*, 56 N. Y. 200, and *Wasmer v. Delaware, etc.*, *R. R. Co.*, 80 N. Y. 212 (36 Am. R. 608).

This implied criticism upon the Ryan and Kerr cases is not an unjust one. Both of those cases have been distinguished, and had assigned to them a rather restricted and qualified value as precedents, but neither one has been held to have been wrongly decided upon the facts upon which it especially rested by any of the cases above enumerated, or to have been without some support both in reason and in justice.

The case of *Milwaukee, etc.*, *R. W. Co. v. Kellogg*, 94 U. S. 469, was an action by the latter against the former for negligently setting fire to its elevator standing on the bank of the Mississippi river in the State of Iowa, by means of which fire was communicated to the plaintiff's saw-mill and lumber, a distance of five hundred and thirty-eight feet, and such mill and lumber were also destroyed. The Supreme Court of the

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United States held, that upon the facts as presented by the record, the railway company was liable for the damages sustained by Kellogg, declaring the true rule to be that what is the proximate cause of an injury is ordinarily a question for the jury, and not one either of science or of legal knowledge, and disapproving the Ryan and Kerr cases in so far as they might be construed as enunciating a different rule.

The facts upon which the case of *Fent v. Toledo, etc., R. W. Co.*, 59 Ill. 349 (14 Am. R. 13), was based were as follows: On the 1st day of October, 1867, a locomotive with a train of freight cars attached, all belonging to the defendant, while passing eastwardly through the village of Fairbury, threw out great quantities of unusually large cinders, and by that means set fire to two buildings and a lumber yard. One of the buildings thus set on fire was a warehouse near the track. The weather being very dry, and the wind blowing freely in that direction, the heat and flames extended to the house of the plaintiffs, a distance of about two hundred feet, and destroyed it and most of its contents. The evidence tended to establish great negligence in permitting fire to escape from the locomotive. The defendant demurred to the evidence, and the circuit court held the evidence insufficient to sustain the action. The Supreme Court of Illinois, declining to follow the Ryan and Kerr cases, and asserting that they stood alone in the narrowness of the rule they prescribe on the subject of proximate damages, reversed the judgment upon the evidence.

In the case of *Billman v. Indianapolis, etc., R. R. Co.*, 76 Ind. 166 (40 Am. R. 230), the Ryan and Kerr cases were also strongly disapproved by this court, but they were only incidentally referred to in that case as bearing on the general subject of damages resulting from negligence, and not because of any close analogy between them and the case then in hearing. We are, consequently, not irrevocably committed to any particular construction of those cases in their application to the class of cases to which they strictly belong.

In the Kerr case, the court, speaking through its chief jus-

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tice, remarked that there may be cases in which the causes of disaster, though seemingly removed from the original cause, are still incapable of distinct separation from it; and where the maxim *causa proxima, non remota, spectatur*, is not controlled by either *time* or *distance*, but by *the succession of events*, and in that respect, at least, that case is in harmony with the great weight of authority. See, also, the cases of *Gagg v. Vetter*, 41 Ind. 228 (13 Am. R. 322); *Louisville, etc., R. W. Co. v. Krimming*, 87 Ind. 351; *Perry v. S. P. R. R. Co.*, 50 Cal. 578; *Baltimore, etc., R. R. Co. v. Dorsey*, 37 Md. 19; *Bachelder v. Heagan*, 18 Me. 32; *Stuart v. Hawley*, 22 Barb. 619; *Calkins v. Barger*, 44 Barb. 424; *Tourtellot v. Rosebrook*, 11 Met. 460; *Clark v. Foot*, 8 Johns. 421; *Barnard v. Poor*, 21 Pick. 378; 1 Thompson Neg., p. 147, sections 1 and 2; *Higgins v. Dewey*, 107 Mass. 494.

An examination of the authorities we have cited, in connection with others touching the subject under consideration, will make it apparent that railroad companies have generally been held to a stricter accountability for the negligent setting and the negligent spread of fires than merely private parties, and most, if not all, other corporations. The reason of this is the extraordinary use which such companies are permitted to make of fire as an agency in the transaction of their business. By their locomotives and almost endless succession of trains, they send forth in all directions burning, bristling, breathing, seething streams of fire, calculated, oftentimes, to inflict irreparable injury upon the citizen, if not inexorably restrained. These extraordinary privileges involve the necessity of very great care to prevent the setting or spread of fire from locomotives, and have justified the courts in holding railroad companies to a strict accountability for any neglect of proper care in that respect. Railroad cases are, therefore, not always safe precedents in cases of negligent, but not intentional, fires in dwelling-houses, offices and other similar places of business, where the risk of the owner often is as great, if not greater, than any of his neighbors, and where such unremitt-

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ting care, as is required in the management of locomotives, can not be reasonably expected.

As applicable to all classes of the spread of negligent but unintentional fires, and as deducible from what appears to us to be the decided weight of authority, we think it may be safely stated, as a general rule, that where such a fire as the natural, immediate and proximate consequence of its negligent beginning, extends to an adjoining or an adjacent building and consumes it, the party responsible for the commencement of the fire must bear the loss, but where some new and independent agency has intervened and caused the extension of the fire to other buildings, the person originally at fault can not be held liable. *Harrison v. Berkley*, 1 Strobhart, 525. Whether the negligent party can be held accountable for the burning of more remote buildings, and, if so, under what circumstances, are questions we have not fully considered, and concerning which this case requires no definite expression of an opinion.

We construe both paragraphs of the complaint in this case to mean that the appellant's servants and employees negligently, but nevertheless accidentally, set fire to the station-house adjacent to the appellee's hotel building, and that while the station-house was on fire and being thereby consumed, the wind intervened and blew some of the sparks and flames over onto the hotel building, thus communicating the fire also to it, and causing it, with the personal property described, to be also burned up and destroyed.

As thus construed, neither paragraph of the complaint charged, either in direct terms or in equivalent words, that the destruction of the hotel building was the natural as well as the immediate and proximate consequence of the burning of the station-house. On the contrary, the fair inference from the averments in both paragraphs was, that if the wind had not intervened as a new and independent agency, the fire would not have extended to and consumed the hotel building and other property connected with it.

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The unexpected intervention of the wind, even when the fire is voluntarily set upon the premises of the person setting it, has generally been accepted as the intervention of a new and independent agency, and this inference from the intervening force of the wind ought, we think, to have a much stronger and more general application to cases of merely accidental or unintentional fires. It is true, that in the case of *Insurance Co. v. Tweed*, 7 Wallace, 44, the Supreme Court of the United States refused to recognize the wind, which had carried sparks and flames from one building to another in that case, as the intervening of a new force or power, but that conclusion was reached as the result of the construction of a peculiarly worded policy of insurance, and not as an incident to any question of negligence, and can not, in consequence, be regarded as a precedent of any great value in a case like this. It is a matter, too, worthy of observation, that the fire complained of in this action did not originate in any defect in or mismanagement of any railroad machinery, but came from a stove used in an office for heating purposes only, and that in that respect this case stands upon a better footing than most of the railroad cases to which we have either generally or specially referred.

After the most mature consideration of every feature of the case before us, we feel constrained to hold that both paragraphs of the complaint failed to aver facts sufficient to justify the inference that the burning of the hotel building and other property of the appellee resulted as a natural, immediate and proximate consequence of the fire which caught in the station-house, and that for that reason the demurrers to both paragraphs ought to have been sustained.

Although the two cases are not analogous in every respect, the conclusion reached is in general harmony with our holding in the case of *Pittsburgh, etc., R. W. Co. v. Culver*, 60 Ind. 469, and other cases resting upon it. *Pittsburgh, etc., R. W. Co. v. Hixon*, 79 Ind. 111; *Louisville, etc., R. W. Co. v. Ehlert*, 87 Ind. 339.

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The judgment is reversed, with costs, and the cause remanded for further proceedings.

ZOLLARS, C. J., having been at one time of counsel in this cause, expresses no opinion, and does not take part in the decision.

Filed Nov. 25, 1884.

No. 10,183.

FITZGERALD, TRUSTEE, v. GOFF.

WITNESS.—Weight of Evidence.—Supreme Court.—The weight of evidence and the credibility of witnesses are questions for the jury and the trial court, and the Supreme Court will not reverse a judgment on either of these grounds.

SAME.—Contradiction of Witness.—Impeachment.—A party is not authorized to introduce evidence to sustain the moral character of his witness, whose testimony has been contradicted merely, where no attempt has been made to impeach the moral character or reputation of such witness.

QUIETING TITLE.—Cross Complaint.—Verified Answer Denying Execution of Deed.—Burden of Issue.—Where, in an action to quiet the title to real estate, the defendant, by way of cross complaint, asserts that he is the owner of such real estate, and that the plaintiff's claim thereto is unfounded and a cloud upon his title, which he asks to have quieted, and the plaintiff answers such cross complaint, denying under oath the execution of the deed under which the cross complainant claims to derive title, and the record shows that the issue thus joined was the issue tried below, the burden of such issue rests upon the cross complainant, without shifting or change, throughout the trial.

SAME.—Requisites of Deed.—Instruction.—In section 2919, R. S. 1881, it is provided that the conveyance of real estate "shall be, by deed in writing, subscribed, sealed, and duly acknowledged by the grantor or his attorney." An instruction, substantially in the language of the statute, is not an available error, where the controversy in relation to the execution of the deed is not between the grantor and the grantee, or one having actual notice of such deed.

SAME.—Acknowledgment.—Where one of the controverted questions on the trial of a cause is in relation to the acknowledgment of a deed, an instruction as to how and by whom an acknowledgment may be taken is not erroneous.

INSTRUCTIONS.—Exceptions.—Where instructions are objected to solely upon the ground that they do not fully state the law on the subject-matter

99	28
145	678
99	28
168	266

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thereof, it is incumbent on the objecting party to ask the trial court for additional instructions covering the omitted points, for, in such a case, the mere saving of an exception to the instruction given will not constitute an available error for the reversal of the judgment.

DEED.—*Execution of.*—*Delivery an Essential Requisite.*—*Intention of Grantor.*—

The delivery of a deed is an essential requisite of its execution. The deed takes effect from its delivery; and if it should pass into the grantee's possession without the grantor's intention that it should become operative, and be used for the purpose apparently intended, it has no legal existence as a deed, and no person can gain any rights thereunder.

SAME.—*Unauthorized Delivery.*—*Record of Deed.*—*Innocent Purchasers.*—

A deed delivered without the knowledge, consent or acquiescence of the grantor, is no more effective than a deed wholly forged would be to pass the title to the grantee, and the record of such deed will afford no protection to innocent purchasers.

JURY.—*Misconduct of.*—*Bailiff's Presence in Jury-Room.*—*Counter-Affidavits.*

Supreme Court.—The unexplained and unnecessary presence of the bailiff of the jury in their room, during their deliberations, is good cause for a new trial, as constituting misconduct of the jury; but where it is shown by counter-affidavits, and the trial court decides, that the presence of the bailiff in the jury-room was necessary to the proper discharge of his duties as bailiff, and did not harm the complaining party, the Supreme Court will not disturb such decision on the weight of the evidence.

From the Marion Circuit Court.

A. L. Roache and E. H. Lamme, for appellant.

W. W. Woollen, for appellee.

Howk, J.—This was a suit by the appellee, Eliza A. Goff, against the appellant, Fitzgerald, trustee of the "Mercantile Trust Company of New York," and a number of other persons, as defendants. In her complaint the appellee alleged that she had the legal title to, and was in the peaceable possession of, the south half of lot No. 8, in Coburn and Blackford's subdivision of square No. 11, in the city of Indianapolis; that the appellant and each of his co-defendants set up and claimed an interest and estate in and to such real estate adverse to the appellee's estate and interest therein; that heretofore, from January 1st, 1879, to March 19th, 1881, the defendants, the Mercantile Trust Company of New York, the appellant, the trustee of such company, and its agent, Charles

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E. Coffin, wrongfully and without her consent collected, received and appropriated to their own use the rents, issues and profits of the above described real estate, amounting in the aggregate to, to wit, the sum of \$500; that the defendant, the Mercantile Trust Company, was a corporation organized under the laws of the State of New York, and its principal office was in the city and State of New York, and the defendant Coffin and Addison L. Roache were its duly authorized agents in the city of Indianapolis. Wherefore appellee prayed that the defendants, and each of them, might be compelled to show their title to, or interest in, the real estate aforesaid; that such title or interest may be declared null and void as against the appellee's title; and that she might recover judgment for the rents aforesaid as damages, etc.

The defendant, the Mercantile Trust Company, separately answered by a general denial of the appellee's complaint, and it also filed a separate cross complaint, wherein it alleged that it was the owner in fee simple, and entitled to the possession, of the real estate in controversy; that the appellee pretended to claim some interest in or to such real estate, but that, in fact, she had no interest therein, and that her unfounded claim was a cloud upon the title of such cross complainant. Wherefore it prayed that its title might be quieted, etc.

To this cross complaint appellee answered in two paragraphs:

1. By a general denial; and,
2. That the pretended title and ownership of the cross complainant in and to the real estate in controversy was based upon what purported to be a deed from the appellee to one John L. Hanna of the real estate in controversy, a copy of which deed and of its acknowledgment before one William V. Hawk, a notary public of Marion county, is set out in the body of the second paragraph of appellee's answer to the cross complaint; and that she, the appellee, never executed and delivered such deed, and the same is not her act and deed. Wherefore, etc.

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The deed referred to in such second paragraph of her answer purported to have been executed by appellee on the 20th day of March, 1875, and to have been acknowledged on the same day, month and year, and was a (short form) general warranty deed. Such second paragraph of answer was verified by the oath of the appellee.

The first trial of the action resulted in a verdict for the appellee, and, over a motion for a new trial for cause shown, in a judgment accordingly in her favor. Appellant then paid the costs, and took a new trial as a matter of right under the statute. The cause was again tried by a jury, and a general verdict was returned for the appellee. Over appellant's motion for a new trial, the court rendered judgment for the appellee, as prayed for in her complaint.

The overruling of the motion for a new trial is the only error assigned here by the appellant. In this motion many causes were assigned for such new trial, but of these we need only consider such as the appellant's counsel have specially directed our attention to in their exhaustive briefs of this cause.

The fact was conceded upon the trial, and is not controverted here, that, prior to the 20th day of March, 1875, the appellee, Eliza A. Goff, was the owner in fee simple and in the possession of the real estate in controversy. The appellant asserted below, and asserts here, that the "Mercantile Trust Company of New York" was and is the owner in fee simple, and entitled to the immediate possession, of such real estate; but it claimed to derive its title thereto from, through and under the appellee Eliza A. Goff, and it asserted no other or different title to such real estate, or right to the possession thereof, except such as it claimed under Mrs. Goff, through her alleged mesne conveyance of the real estate to John L. Hanna. If the appellee conveyed the real estate to John L. Hanna, by her alleged deed thereof, dated March 20th, 1875, then it subsequently became the property of the Mercantile Trust Company, for it is not controverted that

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Hanna mortgaged such real estate to the trust company to secure a loan of money, and that by and under such mortgage such company had acquired all the title and estate which John L. Hanna had or held in and to such property. In the second paragraph of her answer to the appellant's cross complaint, as we have seen, the appellee averred under her oath, that she never executed and delivered the deed of March 20th, 1875, to John L. Hanna, and that the same was not her act and deed. The sufficiency of this paragraph, either in form or substance, was not called in question in the trial court, nor is it questioned here. Manifestly, the paragraph tendered an issue upon the controlling question in the case.

Upon this issue the jury found generally for the appellee. In answer to interrogatories propounded by the court the jury found specially, in substance, as follows:

The evidence in this cause shows a perfect title in Eliza A. Goff, of record, on the 20th day of March, 1875, to the real estate described in her complaint; and that she is an illiterate and uneducated person, and can not write her name. She did not sign her name, nor make her mark to her name to a deed for said real estate, dated March 20th, 1875, and purporting to be from her to one John L. Hanna. The name of Eliza A. Goff was signed to the said deed by Mrs. Hubbard, and no one directed it to be done. From where Eliza A. Goff was sitting, she could not have seen her daughter (Mrs. Hubbard) sign her name to said deed when it was done. Said deed was not read, nor explained, to said Eliza A. Goff by any person, nor did she, with intent so to do, deliver the said deed to John L. Hanna. Eliza A. Goff never acknowledged the execution of said deed.

With this statement of the case, and of the question at issue, we proceed now to the consideration of the matters complained of here by appellant's counsel. It is earnestly insisted by counsel that the verdict of the jury was contrary to, and not sustained by, the evidence in the cause, and was contrary to law. We can not disturb the verdict on these

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grounds, under the long-settled practice of this court. The questions for trial were mainly questions of fact, involving alleged fraud and forgery, and peculiarly within the province of the jury. The evidence in relation to the alleged execution of the deed by appellee to John L. Hanna was sharply conflicting and could not well be reconciled, and the credibility of the different witnesses was, also, a question for the jury. In such a case, where the verdict has met the approval of the trial court, this court will not disturb the verdict, nor reverse the judgment, on what might seem to be the weight of the evidence. *Fort Wayne, etc., R. R. Co. v. Husselman*, 65 Ind. 73; *Cornelius v. Coughlin*, 86 Ind. 461; *Fellenzer v. Van Valzah*, 95 Ind. 128.

The appellee was a witness on the trial in her own behalf, and on her cross-examination she denied that she had ever executed a mortgage to John L. Hanna, and acknowledged the same before one George W. Powell, a notary public. Afterwards appellant called Powell as a witness and offered to prove by him that appellee had executed such mortgage, and had acknowledged it before him as a notary. The court sustained an objection to the offered evidence, and the ruling is assigned as cause for a new trial. There was no error in this ruling. The evidence was offered for the purpose of contradicting the appellee's testimony brought out by the appellant on an immaterial point not relevant to the issue. 1 Greenl. Ev. 613, *note*. The appellee's testimony was in answer to a question propounded by appellant, and tendered an immaterial side-issue, as to which he was bound by her answer and could not be permitted to contradict it. 1 Greenl. Ev., section 449. Besides the objection was withdrawn in ample time for the introduction of the offered evidence, if the appellant wished to introduce it.

Appellant offered a witness to prove the good moral character of John L. Hanna, and the general reputation of Hanna for truth and veracity. Upon appellee's objection the offered

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evidence was excluded. There was no error, we think, in these rulings. Appellee did not attempt to impeach Hanna by introducing evidence touching his moral character, or to show that his general reputation for truth and veracity was not good. A party can not be permitted to introduce evidence to bolster or sustain the moral character or reputation of his witness, where his testimony has been contradicted merely, and no attempt made to impeach the moral character or reputation of such witness. *Johnson v. State*, 21 Ind. 329; *Presser v. State*, 77 Ind. 274; *Brann v. Campbell*, 86 Ind. 516. The cases cited by appellant's counsel do not support their argument, and are not in conflict with what we here decide. *Gebhart v. Burkett*, 57 Ind. 378 (26 Am. R. 61); *American Ex. Co. v. Patterson*, 73 Ind. 430.

The court of its own motion gave the jury the following instruction: "Under the issues in this case it is incumbent upon the defendant, the Mercantile Trust Company, to establish, by a fair preponderance of the evidence, that said deed from the plaintiff, Eliza A. Goff, to the defendant John L. Hanna, for said real estate, was duly executed and delivered."

Appellant excepted to this instruction, and, upon the same subject, requested the court to instruct the jury as follows: "The plaintiff is bound to prove all the material allegations of her complaint by a preponderance of the evidence. She, the plaintiff, having by proper pleading put in issue the execution of the deed from her to John L. Hanna, it is only necessary for the defendant, the Mercantile Trust Company, who claims title through the said Hanna, to introduce sufficient evidence upon the question of the execution of said deed, so as to justify the court in admitting the same as evidence, which was done. Then the burden of the proof is shifted to the plaintiff, and she must prove by a preponderance of the evidence that she never signed or executed the said deed, nor authorized any one to sign the same for her."

The court refused to instruct the jury as requested, and appellant excepted. The two instructions quoted, the one

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given and the other asked for and refused by the court, are considered together in argument by the appellant's counsel, and we will consider and pass upon them, in the same manner. It is certain, we think, that the court did not err in the instruction given of its own motion; but, if it had erred, it would not follow by any means, that it had also erred in refusing to give the instruction asked for by the appellant. The record discloses the fact, that the issue tried below was the issue joined on the appellant's cross complaint, wherein it was sought to have the title of the Mercantile Trust Company to the real estate in controversy quieted and forever put at rest, as against the appellee. Upon the issues thus joined, it is manifest that the appellant had the burden of the issue, from the introduction of the first evidence until the close of the trial. The preliminary evidence offered by the appellant, for the purpose of making such a *prima facie* case, in relation to the alleged execution of the deed by appellee to John L. Hanna, as would authorize the reading of such deed as evidence, did not in any manner, or to any extent, change the burden of the issue as to appellee's execution and delivery of such deed. After, as well as before, the introduction of such preliminary evidence, it was incumbent on the appellant and his *cestui que trust*, "the Mercantile Trust Company," to establish by a fair preponderance of the evidence, that the deed from the appellee, Eliza A. Goff, to John L. Hanna, of the real estate in controversy, was duly executed and delivered. So, of its own motion, the trial court instructed the jury in the case in hand, and this instruction, we think, contained a correct statement of the law, applicable alike to the issues and the evidence. Upon the pleadings in the cause, the burden of the issues rested upon the appellant, without shifting or change, throughout the trial. *Pate v. First Nat'l Bank of Aurora*, 63 Ind. 254; *Pence v. Makepeace*, 65 Ind. 345, on p. 361, *et seq.*; *Carver v. Carver*, 97 Ind. 497.

In support of their argument upon the question now under consideration, appellant's counsel cite and rely upon the

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following cases: *Meikel v. State Savings Institution, etc.*, 36 Ind. 355, and *Brooks v. Allen*, 62 Ind. 401. These cases do not seem to us to be, in anywise, applicable to the case at bar. In each of the cases, the action was upon a promissory note, and the defence was a special plea of *non est factum*, admitting the execution and delivery of the note, but alleging affirmatively a subsequent alteration of the note by the interlineation of certain additional words. In each of the cases it was held, and correctly so, we think, that if there be no indication of the alleged alteration on the face of the note, the burden of the issue is upon the defendant. In the case in 36 Ind. 355, the court said: "The burden of the issue formed on the paragraph of the answer, above set out, was on the defendant, because the paragraph was affirmative in its character, and admitted everything that the plaintiff would have been bound to prove in order to recover. It admitted the signing and delivery of the note, but alleged a subsequent alteration. The signing and delivery of the note, the facts admitted, entitled the plaintiff to recover, unless some evidence was given of the alleged alteration." It is very clear that the cases cited by counsel are not in point, in the case at bar; for the appellee's answer contains no admission, and denies absolutely, and without qualification, her execution and delivery of the deed to John L. Hanna. We conclude, therefore, that the trial court did not err, either in the instruction given of its own motion, or in its refusal to give the jury the instruction above quoted, at the appellant's request.

The court of its own motion, also, gave the jury the following instruction: "To duly execute a deed for the conveyance of real estate, it must be in writing, and it must contain a description of the real estate conveyed, and the names of the grantor and grantee. It must be signed and acknowledged by the grantor, and the acknowledgment must be certified to by a person authorized to take acknowledgments of deeds."

Appellant's counsel vigorously attack the closing sentence

of this instruction. They say it "should not have been given by the court, and injured the appellant by stating an element, as essential to the due execution of a deed, which is not an essential element. The acknowledgment of a deed does not go to its validity and due execution (and due execution here, the jury must have taken in the sense of validity), but is a condition to its admission to record. The deed has the same force and validity, as between the parties, without the acknowledgment as with it." Doubtless, the sentence last quoted from the argument of counsel is a correct statement of the law, but we fail to see its application to the case in hand, for this is not a controversy between the parties, the grantor and the grantee in and to the deed. Nor can we perceive how the omission of the court to instruct the jury, that, as between the parties, the grantor and the grantee, the deed might have been valid without any acknowledgment thereof, could have possibly injured the appellant, when no such question as that was on trial before the jury. That question was not on trial for two reasons: 1. Because the controversy here was not between the parties, the grantor and the grantee in and to the deed; and, 2. Because the deed, the making and delivery of which were in issue, purported, on its face, to have been acknowledged before the proper officer.

It is true, that the instruction last quoted contains a defective and imperfect statement of the law in relation to the due execution of a deed, in that it omitted to state that, as between the grantor and the grantee therein, and persons having actual notice thereof, a deed might be valid without any acknowledgment or record thereof. But, as applied to the case on trial, the instruction was not erroneous. For here the controversy was not between the grantor and the grantee in the deed, and it is not claimed that the appellant or his *cestui que trust* had actual notice of the deed, or any other notice thereof except such as was afforded by the record of the deed in the proper recorder's office. The due execution of a deed, to be valid and effectual against any person other than the

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grantor, his heirs and devisees, and persons having notice thereof, required that it should be acknowledged before a proper officer, because, without such acknowledgment, the deed would not be entitled to record, and, if recorded, the record would not operate as notice to any one of the existence of the deed, or of the contents of such record. We are of opinion, therefore, that there is no such error in the instruction last quoted as would authorize the reversal of the judgment. In section 2919, R. S. 1881, in force since May 6th, 1853, it is provided: "Conveyances of lands * * * * shall be, by deed in writing, subscribed, sealed, and duly acknowledged by the grantor or by his attorney." In the sentence of the instruction of which complaint is made, the court substantially gave the jury this section of the statute as an instruction; and we can not say that in thus instructing the jury the court committed an error.

Of its own motion, the court further instructed the jury, as follows: "The acknowledgment of a deed consists of two things: *First*. The act of one who has executed the deed, in going before some competent officer or court and declaring it to be his act or deed; or, *Second*. The act of the officer or court in certifying that the grantor has declared the deed to be his act and deed." This instruction is complained of here on the ground chiefly that it "thrust upon the jury the consideration of an element which was, in no wise, essential to a determination of the issues." One of the controverted questions on the trial was whether or not the appellee had ever acknowledged the deed before the notary public, whose certificate of acknowledgment was annexed to such deed. Evidence was introduced by both parties bearing on this question, and it was proper enough for the court to instruct the jury in relation to the acknowledgment of a deed, and the manner of taking and certifying such acknowledgment. This the court did, and we can see no error in the instruction given.

The following instruction was given by the court, of its own motion: "Every deed for the conveyance of real estate

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must be signed by the grantor. This may be done in three ways: *First*. The grantor may sign it in person, and with his own hand, by writing or making his or her mark to his or her name written by another to the deed; *Second*. He may in writing, or by parol, direct another person in his presence to sign his name to the deed; *Third*. He may, by power of attorney duly executed, authorize another to sign his name to the deed for him, either in his presence or absence."

Appellant's counsel object in argument to this instruction, not on the ground of anything stated therein, but on account of what it omits to state. It is said, and correctly so, we think, that where a deed is executed without competent authority from the grantor, he might afterwards so ratify and confirm such deed as to render it equally as valid and binding on him as if it had been executed by his express authority. *Fouch v. Wilson*, 59 Ind. 93. It is claimed that the instruction under consideration is defective and imperfect, because it failed and omitted to inform the jury that, even where the execution of a deed was at the time entirely unauthorized by the grantor, yet, by his subsequent conduct, the grantor might so far approve and ratify such deed as to render it valid and effective. Because of this defect and imperfection in the instruction, counsel earnestly insist that it is so erroneous as to require the reversal of the judgment. In this case, however, there was no evidence before the jury tending to show a subsequent approval and confirmation of appellee's alleged deed to John L. Hanna; and, therefore, it was unnecessary for the court to instruct the jury in regard to the effect of a subsequent ratification of an unauthorized deed.

Besides, it is conceded that the instruction contained a correct statement of the law as far as it went, and it is objected to here solely on the ground of its failure or omission to instruct the jury in relation to the effect of a subsequent ratification of an unauthorized deed. The general rule is, however, that such an objection to an instruction will not constitute an available error for the reversal of the judgment. In

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Jones v. Hathaway, 77 Ind. 14, the rule of practice in such a case is thus stated: "Where the instructions given do not contain any erroneous statement of the law, and are objected to upon the ground that they do not fully state the law upon all the issues in the cause; it is incumbent on the objecting party, if he desires to make his objections available in this court, to ask the trial court for additional instructions covering the omitted points. If the party fails, in such a case, to ask the court for such instructions, he can not, by merely excepting to the instructions given, get such an error into the record as will be available to him on appeal, in this court." The rule as here stated has been approved by this court in many subsequent decisions. *Taggart v. McKinsey*, 85 Ind. 392; *Hodge v. State*, 85 Ind. 561; *Powers v. State*, 87 Ind. 144; *Ireland v. Emmerson*, 93 Ind. 1 (47 Am. R. 364).

The court gave the jury, of its own motion, the following instructions: "A deed may be written, signed, acknowledged and certified, and still be inoperative for want of delivery, for delivery is an incident essential to the execution of a deed. The question of delivery is always one of the intention of the parties. If the deed passes into the hands of the grantee, without the intention on the part of the grantor that it should become operative and be used for the purpose intended, it is not a delivery."

And further, "A deed takes effect from its delivery, and until the maker parts with its possession and yields up his right to control it, the deed has no legal existence, and no other person can gain any rights under it."

These two instructions are discussed together in the brief of appellant's counsel, and we will consider and pass upon them in the same manner. These instructions, like the one last considered, are complained of here, not so much on account of what is stated therein, as upon the ground that they do not contain all the law in relation to the delivery of a deed, which, counsel claim, should have been given to the jury. Each of the two instructions states the law fairly and correctly as far

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as it goes, as the same has been declared in many of the decisions of this court. *Goodsell v. Stinson*, 7 Blackf. 437; *Tharp v. Jarrell*, 66 Ind. 52; *Vaughan v. Godman*, 94 Ind. 191. We can not say that the two instructions were not applicable to the case on trial, and, as they state the law correctly, we can not hold them to be erroneous, merely because they do not contain a statement of the law applicable to every feature of the case. In such a case, as we have already said, it is the duty of the party who complains of the instructions as given to ask the trial court for additional instructions supplying the omissions in those already given.

Of its own motion, the trial court gave the jury the following instruction: "If you are satisfied by the preponderance of the evidence in this case, that the plaintiff's name was signed to the deed from her to the defendant John L. Hanna, by her authority, and if her attention was called to that fact by the officer taking the acknowledgment of the deed, and if she knew what the instrument was, and knew her name was signed to a deed, and if she was asked if she acknowledged the execution of the deed, and she said she did, and she understood what it was, and permitted the said John L. Hanna to take said deed away, after having acknowledged it, that would be an execution and delivery of the deed, within the requirements of the law, and your verdict should be for the defendant on its cross complaint. But, if you are not so satisfied, your verdict should be for the plaintiff."

Upon the face of this instruction, it was manifestly addressed by the court to the issues joined upon the cross complaint by the appellee's answers thereto, and the evidence introduced by the parties, bearing on those issues. Appellant's first objection to the instruction, in argument, "because it places the burden of proof upon the appellant," therefore, is not well taken. For, as we have already said, the burden of the issues joined on the cross complaint was upon the appellant, from the commencement until the close of the trial. The second objection of appellant's counsel to the instruction

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last quoted is, that it omits to tell the jury that appellee's subsequent ratification of the deed was a sufficient execution thereof to make a good title in the appellant. Here, again, the complaint is, not of what the instruction contains, but of an omitted proposition of law, which the court might have given to the jury, if the appellant had properly requested the court so to do, at the proper time. For reasons already given, we think that this objection to the instruction ought not to be sustained. The last objection urged to this instruction is, that it makes the appellant's title depend upon the acknowledgment and explanation of the notary. It seems to us, however, that the instruction is not fairly open to the construction which is thus sought to be placed upon it. The evidence tended to show that the appellee could not and did not sign her name to the deed to John L. Hanna. In such a case, the section of the statute (section 2948, R. S. 1881) seems to contemplate that the officer, before whom the deed is acknowledged, shall explain to the grantor the contents and purport of such deed; but it is expressly provided, that the failure of such officer so to do shall not affect the validity of any deed. Fairly construed, the instruction complained of is not, we think, in conflict with these statutory provisions.

Appellant's counsel next complain, in argument, of the refusal of the court to give the jury the following instruction: "In regard to the acknowledgment of the deed from the plaintiff to said Hanna, I instruct you that if the notary, William V. Hawk, was satisfied in his own mind, that the plaintiff knew the contents of the paper she was executing, then, and in that event, it was not necessary that he should, as such notary, read or explain the same to her."

It is very clear, we think, that the court did not err in its refusal to give the jury this instruction, for the reason that it assumes the existence of the principal fact in issue in this cause, namely, that the appellee was executing the deed to John L. Hanna. It is settled by many decisions of this court, that the trial court has no right to assume, in an instruction,

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the existence of any fact which the jury were required to find from the evidence. *Killian v. Eigenmann*, 57 Ind. 480; *Scott v. State*, 64 Ind. 400; *Jackman v. State*, 71 Ind. 149.

Complaint is also made by the appellant's counsel of the court's refusal to give the jury the following instruction: "If you believe from the evidence that the plaintiff knew that her daughter was signing her name to a paper purporting to be a deed, for the purpose of conveying the property in controversy, with the view of his, the said Hanna's, procuring a loan on the same, and permitted her name to be so signed, even out of her immediate presence, and made no objection thereto, and the property having passed into the hands of an innocent third person for value, such deed would be binding on the plaintiff, and she can not recover."

We are of opinion that the court committed no error in refusing to give the jury this instruction. It utterly ignores the question of the delivery of the deed, which was directly involved in the issues on trial before the jury. Even if the evidence showed that the deed was signed by the daughter of the appellee in her presence and by her authority, yet, if the evidence failed to show that the deed thus signed had been delivered by the appellee, or by her authority, the deed would not be binding on her, and, under the issues, she could recover. In the recent case of *Henry v. Carson*, 96 Ind. 412, it was well said: "A deed, delivered without the knowledge, consent or acquiescence of the grantor, is no more effectual to pass title to the grantee than if it were a total forgery, although the instrument may be spread upon the record, and innocent purchasers are not protected." And see the authorities there cited.

Appellant's counsel further complain of the court's refusal to give the jury the following instruction: "If you believe from the evidence that the deed from the plaintiff to the said Hanna was duly executed and delivered, but was procured by fraud, or that the consideration therefor never was paid by the said Hanna to the plaintiff, yet, if you shall find that

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the defendant, the Mercantile Trust Company, is an innocent purchaser for value of said property through the said Hanna, without notice of any fraud or failure of consideration, it would be entitled to hold the property under such conveyance, and the plaintiff can not recover."

The court did not err, we think, in its refusal to give the jury this instruction. It was not applicable to the issues in the cause, and was calculated to mislead and confuse the jury by directing their attention to questions and matters entirely outside of the issues in the cause. Neither in her complaint, nor in her answers to appellant's cross complaint, did the appellee assert or claim that the deed of the property to John L. Hanna had been obtained from her by fraud, or that the consideration therefor had never been paid. She tendered the single issue by her verified answer to the cross complaint, that the deed of her property to John L. Hanna, through which the appellant claimed title, had never been executed or delivered by her, and that the same was not her act and deed. If the jury found this issue for the appellee, as they manifestly did from their verdict, she was entitled to recover; for, in such case, as this court said in *Henry v. Carson, supra*, "innocent purchasers are not protected."

The last cause for a new trial, which is insisted upon here by appellant's counsel as a ground for reversing the judgment, was alleged misconduct on the part of the sworn bailiff having the jury in charge. This is not one of the statutory causes for which a new trial may be granted. Section 559, R. S. 1881. The cause for a new trial, which the appellant, perhaps, intended to assign, was alleged misconduct of the jury in permitting their bailiff to enter and remain in the jury-room for an unnecessary period of time during their deliberations, etc. If this had been the form of the cause assigned for a new trial, we are of opinion, however, that the court might well have found, from the affidavits and counter-affidavits filed by the parties, that the presence of the bailiff of the jury in their room, during their deliberations, was

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necessary to the proper discharge of his duties as bailiff, and did not harm the appellant in any manner. *Doles v. State*, 97 Ind. 555. In such case, of course, this court would not disturb the finding of the trial court on the weight of the evidence.

A careful examination of the record of this cause has led us to the conclusion that there is no error therein which authorizes or requires the reversal of the judgment. The judgment is affirmed with costs.

Filed Dec. 12, 1884.

No. 11,461.

CURTIS ET AL. v. GOODING.

MORTGAGE.—Foreclosure.—Parties.—Judgment.—A decree of foreclosure is a nullity, as to one of several owners of the equity of redemption who was not a party thereto; and is no bar to another suit against him to foreclose.

SAME.—Subrogation.—Purchaser at Sheriff's Sale.—If, in such case, there has been a sale under the decree, the holder of the sheriff's certificate of sale is by subrogation the real party in interest, and he alone can maintain the second suit.

SAME.—Husband and Wife.—Joint Tenancy.—If such second suit be against a married woman, holding with her husband as tenants by entireties, the husband also is a proper defendant.

COURTS.—Jurisdiction.—The circuit court, being a court of superior general jurisdiction, has the jurisdiction inherent in such a court, and a specific statute giving it jurisdiction in a given case is not required.

REAL PARTY IN INTEREST.—Pleading.—The defence that the plaintiff is not the real party in interest must be specially pleaded.

From the Jennings Circuit Court.

T. C. Batchelor, for appellants.

A. G. Smith and *F. T. Hord*, for appellee.

ELLIOTT, J.—The appellee's complaint alleges that a mortgage of real estate was executed to her by John C. Curtis; that she instituted a suit to foreclose the mortgage, and obtained a judgment and decree; that on the decree the land

99	45
125	72
127	76
127	573

99	45
129	221
99	45
130	235

99	45
131	41
131	198

99	45
138	541
139	229

99	45
140	441
141	155

99	45
153	535

99	45
156	628

was sold; that after the sale she discovered that the land had been conveyed by the mortgagor to James B. Curtis and his wife, Carrie Curtis, and that the latter was not a party to the foreclosure suit; that upon discovering that the land had been so conveyed she paid all the costs of the former suit, and instituted the present one.

It is well settled that if the owner of the equity of redemption is not made a party to the suit, the decree of foreclosure is void. It is not necessary to make the mortgagor a party, although it is proper and is the better practice, but it is indispensably necessary that the person to whom he has conveyed should be a party. As one of the owners of the land was not a party, the decree was void as to her, and the appellee was justified in treating it, so far as she was affected, as a nullity, and if it be a mere nullity, it can not stand in the way of a second suit.

A valid decree will merge a mortgage as a cause of action, though it does not destroy the priority and duration of the lien. In order that the decree shall have the effect to merge the cause of action, it must be a valid one, since to rule otherwise would be to declare that a null thing may destroy or take up a valid thing, and this would be absurd. While it is true, as contended, that a decree works a merger of the cause of action, it is by no means true that a void decree does bring about such a result, for a void decree is in legal effect no decree.

The first paragraph of the complaint does show that the judgment and mortgage are both unpaid, and counsel's argument on this point rests on a false basis and must fall.

It is a mistake to suppose that courts possess only such powers as are expressly conferred upon them by statute. All courts of superior general jurisdiction possess judicial powers independent of legislation. *Nealis v. Dicks*, 72 Ind. 374; *Caranaugh v. Smith*, 84 Ind. 380; *Sanders v. State*, 85 Ind. 318 (44 Am. R. 29); *Little v. State*, 90 Ind. 338 (46 Am. R. 224); *Earle v. Earle*, 91 Ind. 27. Among these general powers

is that of vacating judgments entered by mistake, of relieving against judgments procured by fraud, and of annulling void sales and entries of satisfaction of judgments and decrees. It is no answer to such a suit as the present to affirm that it is not expressly provided for by statute; it is enough if it appears to be one calling into exercise an inherent power resident in all such courts. The adjudged cases recognize and enforce the principle that a judgment which has no force may be treated as a nullity, and a new suit instituted; they, indeed, go further, for they hold that the proper course to pursue is to disregard the invalid judgment entirely, and proceed upon the original cause of action. *Conyers v. Mericles*, 75 Ind. 443; *Davenport v. Sovil*, 6 Ohio St. 459; *State Bank v. Abbott*, 20 Wis. 599; *Strang v. Beach*, 11 Ohio St. 283. This rule, of course, does not apply where the judgment, although erroneous, is not void.

Where an owner of an equity of redemption is not a party to the foreclosure suit, the decree really adjudges nothing as to him, for it is a familiar rule that no one is bound by a decree rendered in a suit to which he was not a party. As the decree is of no force as against one not a party, it is, as to him, a mere nullity, whatever may be its effect upon others, who were served with process. Where an owner of an equity of redemption is not a party, the decree can not merge the mortgage, nor can a sale upon it work a satisfaction as to the person owning the equity of redemption and not a party to the suit. In commencing a second suit to foreclose such an equity, the mortgagee does not twice vex a party for the same cause of action, for there was never any suit upon the cause of action urged in the second suit. The purpose of the second suit is not to obtain a second decree against the same party for the same thing, but its purpose is to secure the foreclosure of an equity of redemption not touched by the first suit. It is perfectly obvious, therefore, that the second suit is not the same as the first, and that it is an essentially different suit prosecuted against a different person, and prosecuted for the purpose of reaching a different interest. Such a case bears

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no resemblance whatever to the case of *Hanna v. Scott*, 84 Ind. 71.

It would be a reproach to the law, if a party to a suit were precluded from bringing a subsequent suit to foreclose an equity of redemption not affected by the first suit, for the reason that its owner was not a party. The law is not subject to this reproach, for it is quite well settled that a suit may be maintained to bar the equity of one who was not a party to the original suit. The penalty that the plaintiff must suffer is the payment of costs, but he is not compelled to lose his lien or his debt. *Shirk v. Andrews*, 92 Ind. 509.

It is true that a decree is valid as to the parties served with process. *Waltz v. Borroway*, 25 Ind. 380; *Dwiggins v. Cook*, 71 Ind. 579; *Hanna v. Scott*, *supra.*. But from this premise it can not be inferred that it is valid as to persons not served, for no man who has not had "his day in court" is bound by the decree rendered in the suit. The question here is not whether the decree was valid as to those served, but whether it was valid as to those not served. That the decree in the first case was not valid as to the owner of the equity not made a party, is so plain that no more than a bare statement of the proposition is needed. If it was not valid, then it is idle to assert that there was a former adjudication.

We do not deem it necessary to discuss the point made by counsel, that, as Curtis and wife were tenants by entireties, the decree was a nullity not only as to the wife, but also as to the husband, for it is enough for the present to hold, as we do, that as to the owner of an equity of redemption not a party to the original cause, the appellee, upon the facts stated in the complaint, had a right to maintain a suit. The prime object of such a suit is to secure a foreclosure of an equity of redemption not touched by the first decree, and it is not material in this case to inquire whether that equity dwelt in a joint tenant or a tenant in common.

Where land is held by husband and wife as tenants by entireties, and the wife is not made a party to the original suit

to foreclose, it is proper, if, indeed, not absolutely necessary, to make the husband a party to the second suit brought to reach the wife's interest.

In a suit to foreclose an equity of redemption not reached by a suit upon the same mortgage, it is not necessary to make persons parties whose rights were fully adjudicated by the first decree, for all that the second decree can properly do is to foreclose the equity of the person not a party to the original suit.

There may be unnecessary allegations in both the first and second paragraphs of the complaint, but, however this may be, there are facts stated entitling the appellee to a decree foreclosing the equity of redemption of the defendant who was not a party to the first suit.

The pleas of former adjudication filed by the appellants are not good. It appears from their allegations that the rights arising out of the equity of redemption vested in Mrs. Curtis were not litigated, and could not have been litigated in the original suit, for the reason that she was not a party. It is evident, therefore, that the former judgment does not operate upon the same estate in land as that here sought to be reached, and it is also evident that there was no judgment ever rendered against the person whose equity of redemption it is sought by this suit to bar and foreclose.

The third paragraph of the answer of James B. Curtis and the second paragraph of the answer of Mary Curtis allege that a sale was made on the decree rendered in the original action, that a sheriff's certificate was issued to the appellee, and that it was by her assigned to Rose Gooding. These answers, after setting forth (with much unnecessary particularity) the proceedings prior to the sale, aver that the certificate issued by the sheriff was assigned by the appellee to Rose Gooding, and that, to quote the language of the pleader, "the said Rose Gooding brought her action against John C. Curtis and Charles B. Curtis to recover possession of said real estate by

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reason of said mortgage, judgment, sheriff's sale, certificate of sale and assignment thereof, and by no other right or title whatever, which said action has not yet been determined, but was pending long after the present action was commenced, and defendant avers that by reason of said assignment and sheriff's deed said Rose Gooding is now the owner of whatever interest the said plaintiff, Mary J. Gooding, ever had in said mortgage, the debt secured thereby, and the mortgaged premises." We think that the facts pleaded show that Rose Gooding, and not the appellee, is the real party in interest.

There is no doubt that the effect of the assignment of the sheriff's certificate was to divest Mary J. Gooding of all rights represented by it, and vest them in her assignee, Rose Gooding. *Maddux v. Watkins*, 88 Ind. 74; *Conger v. Babcock*, 87 Ind. 497; *Davis v. Langsdale*, 41 Ind. 399; *Splahn v. Gillespie*, 48 Ind. 397. This principle is illustrated by the case of *Brown v. Harrison*, 93 Ind. 142, where it was held that money paid to redeem land sold on execution went to the holder of the sheriff's certificate, and not to the assignee of the judgment. In *Hasselman v. Lowe*, 70 Ind. 414, it was held that the assignee of a sheriff's certificate takes all the rights, but no others, that his assignor possessed. The rights which Mary J. Gooding had under the sale evidenced by the sheriff's certificate were in Rose Gooding at the time this action was begun, and the only question that admits of debate is as to the extent and force of the rights transferred by the assignment of the certificate.

The general rule is that the purchaser at a sale upon a decree of foreclosure succeeds to all the rights of the mortgagee in the event that the sale proves invalid. The purchaser either secures a title under his purchase, or the sale is treated as an equitable assignment of the mortgage to him. *Robinson v. Ryan*, 25 N. Y. 320. This equitable assignment operates to subrogate the purchaser to all the rights existing under the mortgage upon which the decree was founded. *Short v. Sears*, 93 Ind. 505; *Jones v. French*, 92 Ind. 138,

Curtis *et al.* v. Gooding.

see auth. p. 142; *Ray v. Detchon*, 79 Ind. 56; *Muir v. Berkshire*, 52 Ind. 149; *Brobst v. Brock*, 10 Wall. 519. But the present case is stronger than most, for here the judgment against the mortgagor was valid, and the only infirmity in the proceedings and decree is that the rights of an owner of an equity of redemption were not adjudicated. Rose Gooding stands as a purchaser, for she takes all the rights which her assignor possessed, and it seems very plain that she is the only party in interest, as Mary J. Gooding has no right, estate or interest at all left in her. It would be productive of much confusion, and often of injustice, to permit one party to claim a right to the original judgment and mortgage, and at the same time allow the assignee to claim title under a deed issued upon the foreclosure sale. The rights growing out of the mortgage which lies at the foundation of the judgment and decree in the first, as well as in the subsequent case, were taken from the mortgagee by the assignment of the certificate, which transferred all the rights of the assignor to the assignee. The doctrine of merger, so far as concerns the right of action, is settled by our decisions, although as to the lien of the mortgage there is no merger. *Bowen v. Eichel*, 91 Ind. 22; S. C., 46 Am. R. 574; *Gould v. Hayden*, 63 Ind. 443; *Evansville Gas-Light Co. v. State, ex rel.*, 73 Ind. 219 (38 Am. R. 129); *Lapping v. Duffy*, 47 Ind. 51; *Ferris v. Cravens*, 65 Ind. 262; *Teal v. Hinchman*, 69 Ind. 379. The cause of action which the mortgage contained passed by the assignment of the certificate to Rose Gooding.

The principal right passed to the assignee Rose Gooding, and with this principal passed all incidents, and one of these incidents was the right to secure the entire estate by barring the outstanding equity of redemption dwelling in an owner not made a party to the first foreclosure suit. It can not be held, without violating fundamental doctrines, that the principal right can reside in one person, and an incident, inseparably connected with that right, exist in still another person. As the incident owes its existence to the principal right, it is

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the person who possesses that right who also possesses the incident. The two things are inseparably blended, and the owner of the principal is, of necessity, the owner of the subordinate right annexed to it.

It has long been the rule that the defence that the plaintiff is not the real party in interest must be specially pleaded. *Lamson v. Falls*, 6 Ind. 308; *Swift v. Ellsworth*, 10 Ind. 205; *Garrison v. Clark*, 11 Ind. 369; *Lawrence v. Long*, 18 Ind. 301; *Hereth v. Smith*, 33 Ind. 514; *Treadway v. Cobb*, 18 Ind. 36; *Mendenhall v. Baylies*, 47 Ind. 475; *Felton v. Smith*, 84 Ind. 485; *Board, etc., v. Jameson*, 86 Ind. 154. It is not enough to state in general terms that the plaintiff is not the real party in interest, but facts must be specifically pleaded showing who is the real party in interest. In *Hereth v. Smith*, *supra*, the court, by WORDEN, J., in speaking of an answer setting up the defence in general terms, said: "That such pleading is bad needs the citation of no authorities, but for the convenience of reference we cite the following: *Garrison v. Clark*, 11 Ind. 369; *Elder v. Smith*, 16 Ind. 466; *Raymond v. Pritchard*, 24 Ind. 318; *Lewis v. Sheaman*, 28 Ind. 427."

It was necessary for the appellants to set forth, with reasonable particularity, the facts showing the transfer of title to Rose Gooding, and it can not be justly said that the prolixity with which the facts are pleaded shows that the answers were designed to set forth some other defence. The old maxim in the law of pleading, that surplusage does not vitiate, forbids the conclusion which the appellee seeks to establish.

It is true that a plaintiff in his pleadings must always show title, and, where the general denial is interposed, must always establish it by his evidence; but this rule does not antagonize the rule laid down in the cases to which we have referred. The only title a plaintiff is required to show is a *prima facie* one, and in order to defeat such a title facts showing some one else to be the real party in interest must be specially pleaded. This case supplies an apt illustration. Mary J. Gooding, by showing a note and mortgage executed to her made out a

 Carr v. Kolb, Superintendent.

prima facie title, and in order to be entitled to give evidence tending to defeat that title, it was necessary for the appellants to plead the decree, sale, execution of the sheriff's certificate, and its assignment to Rose Gooding.

Judgment reversed.

Filed Dec. 16, 1884.

No. 10,990.

CARR v. KOLB, SUPERINTENDENT.

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137 254

HIGHWAYS.—Dedication.—Dedication of land to public use as a highway may be inferred from public use thereof as such for nineteen years, with the consent of the owner, together with his acts and declarations explanatory of his intention, and surrounding circumstances.

From the White Circuit Court.

A. W. Reynolds and *E. B. Sellers*, for appellant.

M. M. Sill and *T. F. Palmer*, for appellee.

BICKNELL, C. C.—The appellant brought this suit against the appellee, as superintendent of roads, to restrain him by injunction from removing the appellant's fence. The appellee threatened to remove the fence because it was obstructing a highway; the appellant claimed that the fence was on his own land and not in the highway.

The court tried the cause upon complaint, answer and reply, and found for the defendant, overruled the plaintiff's motion for a new trial and rendered judgment on the finding. The plaintiff appealed. He assigns as error the overruling of the motion for a new trial. The reasons stated for a new trial were, that the finding was not sustained by sufficient evidence, and was contrary to law and the evidence. The suit was commenced in September, 1882. The fence in controversy was built in June or July, 1882.

There are two questions in the case: *First*. Was the highway located in the proper place? *Second*. Was there suffi-

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cient proof of a dedication by the plaintiff to the public of the highway as it was?

It is by no means clear upon the evidence, that there was any mistake in the location of the highway; there was evidence tending to show that the center line of the highway as theretofore used by the public was the true line; but whether there was a mistake or not, there was evidence tending to show a dedication of the highway, as located, by the plaintiff to the public, and an acceptance thereof by the public.

It appeared in evidence that the highway was laid out and opened in 1851, under proceedings authorizing the location thereof on the half mile line in section 5, of town. 25, of range 4 west, and was used ever afterwards by the public as a highway, forty feet wide, twenty feet on each side of said line, until June or July, 1882, when the fence in controversy was built by the plaintiff; that the plaintiff, about nineteen years before suit brought, he then and ever since owning lands bounded by said highway on the west, built a fence along said highway and kept it there continuously on the east line of the highway until recently, when he ascertained as he supposed, that the center line of said highway was not the true half mile line of said section 5, and then he built the fence in controversy where he supposed he had a right to put it, eight feet nearer the center of the road than the old fence.

It appeared that the old fence left the road forty feet wide free from obstruction, and that during all of said nineteen years, and up to the time the new fence was built, the plaintiff made no claim against the public use of said highway as opened, but that during all of said time the same has been used, worked and improved by the public without any objection from the plaintiff, and with his knowledge. In the *City of Columbus v. Dahn*, 36 Ind. 330, this court, by WORDEN, J., said: "The question, whether a person intends to make a dedication of ground to the public for a street or other purpose, must be determined from his acts and statements explanatory thereof, in connection with all the circumstances

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that surround and throw light upon the subject. * * * And this is on the principle that the public have the right to suppose that a man intends what his outward conduct and statements indicate. * * Men, in all the affairs of life, are presumed to intend what is fairly and clearly indicated by their acts and conduct; and where the rights of the public or third parties are concerned, they have a right to act upon such presumption."

In *Holcraft v. King*, 25 Ind. 352, where the road had been laid out four and a half rods west of its true line, this court said: "Public highways may be established in this State, first, by order of the board of commissioners of the county; secondly, by express grant; thirdly, by dedication, arising by presumption from a continued use of the place for a considerable period of time by the public as a public highway, with a knowledge thereof by the owner, and without objection on his part." See, also, *Faust v. City of Huntington*, 91 Ind. 493; *Board, etc., v. Huff*, 91 Ind. 333; *Green v. Elliott*, 86 Ind. 53; *Ross v. Thompson*, 78 Ind. 90; *Campbell v. O'Brien*, 75 Ind. 222; *Summers v. State*, 51 Ind. 201; *Fisher v. Hobbs*, 42 Ind. 276; *City of Evansville v. Evans*, 37 Ind. 229; *Hart v. Trustees, etc.*, 15 Ind. 226; *State v. Hill*, 10 Ind. 219. The cases of *Mansur v. State*, 60 Ind. 357, and *Bidinger v. Bishop, etc.*, 76 Ind. 244, cited by the appellant, are not in conflict with any of the other cases above cited.

We think the finding was sustained by sufficient evidence, and was not contrary to law. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed Jan. 26, 1883. Petition for a rehearing overruled Jan. 7, 1884.

 Bauer v. The City of Indianapolis et al.

No. 10,879.

BAUER v. THE CITY OF INDIANAPOLIS ET AL.

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 171 495

SUPREME COURT.—*Evidence.*—*Witness.*—*Record.*—*Exception.*—An exception to the ruling of the trial court, in refusing to permit a party to put a question to his own witness, presents no question in the Supreme Court unless the record shows the evidence intended to be elicited, and that the court was informed thereof.

CITY.—*Sidewalk.*—*Negligence.*—*Evidence.*—In a suit against a city for an injury received in consequence of an obstruction upon a sidewalk, evidence that others had passed over it without injury is not admissible; nor is evidence that the plank crossing, which was the obstruction, was not different from the generality of crossings of like character in the city.

From the Superior Court of Marion County.

A. C. Harris and W. H. Calkins, for appellant.

R. B. Duncan, C. W. Smith and J. S. Duncan, for appellees.

COLERICK, C.—This action was brought by the appellant against the appellees to recover damages sustained by him in the breaking of his leg, which was caused, as alleged, by his falling upon a sidewalk in the city of Indianapolis, Indiana. It was averred in the complaint, that the appellee Baker, without leave or license from his co-appellee, the city of Indianapolis, had unlawfully, carelessly and negligently obstructed a sidewalk, adjoining certain real estate owned by him, in said city, by causing to be placed thereon a large number of heavy planks and timbers, which raised the otherwise even surface of the sidewalk, at said point, several inches higher than it was on either side of the obstruction, and rendered passage over the sidewalk dangerous to travellers passing thereon, and that the city had notice of the dangerous obstruction of said sidewalk, which remained thereon, and was maintained by said Baker, with the knowledge of the city, for the period of three months, and that the city, for said period of time, had carelessly and negligently suffered and permitted said obstruction to remain thereon, without attempting to remove it, and that the appellant, without fault

or negligence on his part, and whilst using due care, on the 23d day of December, 1880, in passing over and along said sidewalk in the dusk of the evening, while said obstruction was partially obscured by snow, was violently thrown to the ground, in consequence of said obstruction, and his leg was thereby fractured and broken, etc. Wherefore, etc.

To this complaint, an answer of general denial was filed. The issues were tried by a jury, who returned a verdict in favor of the appellees, upon which, over a motion for a new trial, judgment was rendered.

The only error assigned is the overruling of the motion for a new trial, and of the many causes specified in its support the only ones that are urged in this court are the rulings of the court below in the admission and exclusion of certain evidence, which is recited in the motion, and the giving by the court to the jury of certain instructions, to which we will hereafter more fully refer.

To properly appreciate the questions submitted for our consideration, it is essential that the facts in the case should be briefly stated. The following statement of the facts appears in the appellant's brief, and we find, on an examination of the record, that it is in harmony with and fully supported by the evidence adduced at the trial :

"The plaintiff relied for a recovery on the facts following : That on the evening of the 23d day of December, 1880, about dusk, he was walking on the sidewalk, at a brisk pace, on the north side of South street, and on the south side of the lot owned by the defendant Baker, in the city of Indianapolis ; that Baker had, some one or two years before that time, laid a carriage way across the sidewalk, for his own private use, which was made of heavy two and one-half or three inch plank, laid lengthwise on the pavement ; that either from imperfect construction, or by having warped in the sun, the ends of the planks stuck up above the surface of the sidewalk from one to four inches, some sticking up higher than others ; that on the afternoon of said 23d day of De-

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ember a light skift of snow had fallen, perhaps half an inch, which partially covered the defects in the sidewalk; that he stepped with his right foot on the ends of the planks, which slipped off with such force that it caused him to fall and break his leg and hurt his arm."

The first question presented for our consideration is the action of the court in excluding certain evidence. It appears that James T. Marshall, a police officer of the city, was called by the appellant as a witness, and testified, among other things, that he heard the appellant groan, and that he went to his rescue after he fell, and found him lying on the planks, apparently hurt, and that he helped him up, and assisted him home. In his examination-in-chief he alluded to a conversation he had with the appellant when he first went up to him, but did not state what was said in the conversation. The bill of exceptions shows that on his cross-examination and re-examination, he testified as follows:

CROSS-EXAMINATION.

* * * * *

"Question. He told you he had slipped and fallen, did he?
 Answer. I could not tell you the exact words the gentleman said, with the exception of some few things that bore on my mind.

"Ques. You asked him how it happened, did you not?
 Ans. No, sir; he said this way, he says, 'Now I have made a good day's work.'

"Ques. (Interrupting.) I do not care about that, I want to know what he said about slipping? Ans. He said he had fell there, and hurt himself.

"Ques. Did he say he had slipped and fallen? Ans. That is something I could not tell you.

"Ques. You do not know what he said on that subject?
 Ans. No, sir; not on that one specific subject, but I remember of other statements he made to me."

RE-EXAMINATION.

"Ques. Now I wish you would go ahead and give the

whole of that conversation at the time the plaintiff fell there, you have given part of it, now give the whole of it?

"Objected to as incompetent, except so far as it pertains to how the plaintiff fell.

"Court. To that extent I sustain the objection.

"To which ruling of the court the plaintiff, by his counsel, then and there excepted.

"Ans. There was nothing said any more about his slipping and falling. The rest was in relation to his family."

If any error was committed by the court in its ruling in sustaining, to the extent stated, the objection to the question propounded, which we need not decide, it was harmless, as it clearly appears by the answer of the witness to the question last propounded, that he had repeated, on his cross-examination, all that was said to him by the appellant in the conversation alluded to, that was relevant or material to the issues in the case. It is insisted by the appellant that it was competent for him to give in evidence his exclamations of pain and suffering, caused by the injury. Such is the law, see 1 Greenl. Ev., section 102; but it has been often held by this court that "The sustaining of an objection to a question asked by a party to his own witness is not available as error in this court, unless the record shows that the trial court was informed what was proposed to be proved by the answer to the question." See *Conden v. Morningstar*, 94 Ind. 150, and the cases there cited. In this case no such information was imparted to the court. The record fails to show that any question relating to that subject was ever propounded by the appellant. No available error, if any, was committed by the court in its ruling.

The record shows that the following evidence was introduced by the appellees on the trial, over the objection of the appellant:

"Benjamin Davis testified as follows:

"Question. State whether you ever fell, stumbled, or

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stumped your toe on that place going along over it? Answer. I never stumbled over it.

"Ques. Who, if any one else, did you ever see stumble there? Ans. I never saw anybody.

"Ques. Who, if any one, did you ever hear of doing anything of that kind prior to your hearing of this plaintiff stumbling there? Ans. I have no recollection of hearing of any one stumbling or falling there.

"Ques. What difference, if any, did you notice between this crossing and the generality of crossings, as you observed them? Ans. It would about average with the other crossings.

"Ques. You state that as a fact, do you? Ans. I state that as my judgment.

"Ques. You say that is your judgment, based upon what? Ans. The general appearance of the crossing with others.

* * * * *

"James Caldwell testified as follows:

"Ques. If you ever stumbled or fell, or saw any one stumble or fall, then tell the jury? Ans. I never did.

"Ques. What, if anything, did you ever hear of any one stumbling or falling there before Mr. Bauer was hurt? Ans. I never did.

"Ques. Have you observed other crossings as you would be travelling around the city? Ans. Yes, sir, I have.

"Ques. What difference, if any, would there be between the generality of them and this one? Ans. I have seen some worse ones and some better.

"Ques. As a fact, how is it as to the generality of the others you have seen? Ans. As good."

Similar questions were asked by the appellees of other witnesses, and answered by them.

The court erred in permitting the appellees to prove that persons other than the appellant had safely passed over the crossing in question. The evidence was incompetent. See *Kidder v. Dunstable*, 11 Gray, 342; *Temperance Hall Ass'n of Trenton v. Giles*, 33 N. J. L. 260. In the case first cited

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it was held that in an action against a town for injuries sustained from a defect in a highway, evidence that persons other than the plaintiff had passed and repassed the place in safety was inadmissible. And in the case last cited it was held that it was not competent, on the part of the defendant, to prove that persons had passed and repassed without accident the area opening into the sidewalk in which the plaintiff had fallen and was injured. The court said: "The reason for excluding all evidence of this character is, that it would lead to the trial of a multitude of distinct issues, involving a profitless waste of the time of the court, and tending to distract the attention of the jury from the real point in issue, without possessing the slightest force as proof of the matters of fact involved."

It was correctly stated by this court in *Nave v. Flack*, 90 Ind. 205 (46 Am. R. 205): "If the place was actually dangerous, then the fact that others had used it and escaped unhurt would not relieve the appellants from liability. The ruling question was whether the place was in truth dangerous, and if it was shown to be so then the fact that others had used it in safety would not change its character, nor deprive the appellee of his right to redress. A place proved to be unsafe may have been used without harm, but because this has been done does not alter its actual condition. Men may and do use unsafe places without receiving injury, but this does not show that a place proved to be really dangerous is not so."

The case of *City of Delphi v. Lowery*, 74 Ind. 520, is not in conflict with the views above expressed. In that case it was properly held that for the purpose of showing that a municipal corporation had notice of a dangerous place within or near the limits of one of its streets, evidence that other persons had previously been injured there is competent. The doctrine there declared is now established as the law by the current and weight of authority. But such proof does not authorize the city to prove that other persons had passed the place in safety. Such negative evidence would have no force or weight, for the reasons stated in *Nave v. Flack*, *supra*.

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The court also erred in allowing the appellees to prove that there was no difference between the crossing in question and the generality of crossings of like character in the city. Evidently, the purpose and tendency of the evidence were to show that in respect to its safety to persons passing over it the crossing in question compared favorably with other similar crossings in the city. If it did, such fact, although established by incontrovertible proof, would not shield the appellees from liability to one who, without fault or negligence on his part, was injured in passing over it, by reason of its dangerous condition, as it was the duty of the owner of the property upon which it existed to see that the crossing was at all times safe and free from danger to persons lawfully passing over it, regardless of the condition of other like crossings. The law in such a case will afford no immunity from liability to the injured person by proof that the crossing was no more dangerous than other crossings of a similar character in the city. If they were all equally dangerous to cross, it would constitute no defence to the action. The evidence was irrelevant and immaterial, and therefore incompetent. See *Bliss v. Wilbraham*, 8 Allen, 564, where it was held that in an action against a town to recover damages for an injury by reason of a defective bridge, no exception lies to the exclusion of a question, put to the defendant, as to how the bridge compared on the day of the accident, in respect to its safety and state of repair, with other bridges of like character on roads of like amount of travel.

The court in its fifth instruction stated to the jury, among other things, that they might consider "how often, if at all, persons other than the plaintiff, and before the alleged injury to him, passed over the crossing without stumbling or slipping upon it," and in its fourth instruction stated that, "in determining whether or not the sidewalk in question was reasonably safe at the time of the alleged accident to the plaintiff," the jury might consider, among other things, "how it compared in its general character with the generality of sim-

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ilar plank crossings over sidewalks in the city of Indianapolis." These two instructions, to the extent quoted at least, were, for the reasons above stated, erroneous.

The court erred in overruling the motion for a new trial, and for the error so committed the judgment ought to be reversed.

PER CURIAM.—The judgment of the court below is reversed at the costs of the appellees, and the cause is remanded with instructions to the court to sustain the motion for a new trial, and for further proceedings in accordance with this opinion.

Filed Dec. 17, 1884.

No. 9280.

HAMILTON v. SHOAFF.

INTERROGATORIES TO JURY.—*Submission.*—*General Verdict.*—Answers by the jury to interrogatories, where it does not appear by the record that the interrogatories had been, by the court, submitted to the jury, can not override a general verdict.

SAME.—*Harmless Error.*—To refuse to send interrogatories to the jury, answers to which could not overrule or antagonize a general verdict, is a harmless error.

EVIDENCE.—*Records.*—Parol evidence of the contents of a public record is inadmissible.

SAME.—The contents of a book kept in another State, called a "transfer-book," not shown to be a public record, are not admissible in evidence against one who did not make the entries therein.

SAME.—*Swamp Lands.*—*Judicial Knowledge.*—*Title.*—Courts take judicial knowledge of the act of Congress of September 28th, 1850, granting swamp lands to the States, and a patent for such lands from the United States to the State of Iowa, dated in 1869, is sufficient proof of title in that State at the date of the act of Congress.

SAME.—*Deed.*—*Breach of Covenant.*—*Seizin.*—In a suit for breach of covenant of seizin in a deed, the plaintiff by his evidence showed a chain of deeds beginning with one from K., made in 1868, and extending to the defendant, and then title in the State of Iowa granted by the United States in 1850.

Held, that title in the State of Iowa in 1850 was not inconsistent with title

99	63
130	172
99	63
141	208
99	63
144	640
99	63
158	390

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in K. in 1868, and, therefore, this evidence failed to show a breach of the covenant, the burden of which, under an answer of general denial, was on the plaintiff.

From the Superior Court of Allen County.

A. A. Chapin, for appellant.

R. S. Robertson and *J. B. Harper*, for appellee.

BLACK, C.—The appellant sued the appellee for breach of the covenant of seizin in a deed of conveyance of certain land situated in Palo Alto county, Iowa, executed by the appellee to the appellant.

The complaint showed the conveyance for a valuable consideration and the covenant, exhibited the deed, denied the defendant's seizin, and alleged that the paramount title was in other persons, not named.

There was an answer of general denial, and the issue thus formed was tried by a jury. A general verdict for the defendant, with answers to interrogatories, was returned. The plaintiff's motion for judgment on these answers to interrogatories, and his motion for a new trial, were overruled. The rulings upon these motions are assigned as errors.

The record does not show that the interrogatories to which answers were returned were considered by the court, or by it submitted to the jury. Under many decisions of this court, based upon the statute, we are not required to examine the action of the court in overruling the motion for judgment. *Cleveland, etc., R. W. Co. v. Bowen*, 70 Ind. 478; *Cincinnati, etc., R. R. Co. v. Heim*, 97 Ind. 525.

It does appear that the plaintiff asked the court in writing to require the jury, if they should return a general verdict, to answer three certain interrogatories, and that the court refused to submit these interrogatories or either of them to the jury. This refusal was assigned as a cause for a new trial. These questions related to matters as to which there was no evidence. Without regard to the fact that the interrogatories answered do not appear to have been submitted to

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the jury by the court, inasmuch as the jury could not properly return any answers to these questions which were submitted to the court that could override or help to override the general verdict or in any way affect the result reached, the appellant was not harmed by the refusal to submit these questions to the jury.

Some of the causes assigned in the motion for a new trial related to the suppression of certain parts of the depositions of Thomas Walsh and William E. Cullen. It appeared in evidence that the appellee, who conveyed the land in question to the appellant on the 1st of November, 1877, derived his title through a deed executed to him August 18th, 1873, by Allen P. Shoaff, to whom a deed of conveyance was executed December 12th, 1870, by J. W. VanMyers, whose title came to him by a deed of conveyance executed to him by C. H. Kingsley, June 8th, 1868.

There was also introduced in evidence by the plaintiff a quitclaim deed for said land executed by Chauncey H. Kingsley and wife to one Charles C. Smeltzer, on the 21st of October, 1869.

The purpose of the parts of the deposition suppressed was to show the date of the filing for record of said last mentioned deed in the recorder's office of said county.

The witness Walsh was the recorder of deeds of said county of Palo Alto. He, having produced a book in his possession, as such recorder, marked "General Index of Deeds" on the back, was examined as follows:

"Q. 2. Please turn to this index, under the letter K, and see if there is any entry of the indexing of a deed from Kingsley, C. H., to C. C. Smeltzer, and if there is, state what it is? A. There is, which is as follows: Under the head of grantor, Kingsley, C. H., to C. C. Smeltzer, grantee; date of filing Nov. 23, 1869; date of instrument Oct. 21st, 1869; character of instrument, quitclaim; then record book C, page 225; description, S. W. $\frac{1}{4}$ of 7—97—31, with other land.

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"Q. 3. Compare your answer to question 2, and see if it compares strictly with the record in the index. A. It does so compare."

The witness Cullen was examined concerning the same book, as follows :

"Q. 2. Turn to this original index, and state if you find any entry of a deed from Kingsley, C. H., to C. C. Smeltzer, and if so, what it is? A. I do, and it is as follows: Under the head of grantor, Kingsley, C. H.; grantee, C. C. Smeltzer; date of filing Nov. 23d, 1869; date of instrument Oct. 21st, 1869; character of instrument, quitclaim; where recorded, book C. 225; description, S. W. $\frac{1}{4}$ 7—97—31, with other lands.

"Q. 3. Examine your answer to question 2 and see if it compares with the record in the index. A. It does compare."

The answers of these two witnesses, which we have quoted, were struck out. Such an official record in another State can not be proved in this State by parol evidence of its contents, but it may be proved by a copy thereof. Whether it must be proved by a copy authenticated as provided for by the act of Congress on that subject, or may be proved by an examined copy set forth in a deposition, we need not decide, for we think that the answers struck out did not show, or purport to show, a copy of the entry about which the witnesses testified.

The inadmissibility of parol evidence to prove the contents of a record was sufficient reason for the suppression of a number of other answers in the depositions of these witnesses, to set out which would serve no useful purpose.

Certain answers of the witness Cullen in regard to a transfer-book were excluded on the trial, for the expressed reason that the plaintiff did not prove, or offer to prove, that by the law of Iowa said book was a public record. This was a sufficient reason for the action of the court. Which of two conveyances had priority could not be proved by entries made by a stranger in a book, for the keeping of which there was no law.

Hamilton v. Shoaff.

All the evidence given on the trial was introduced by the plaintiff. As we have shown, he traced the defendant's title to Kingsley, the conveyance from whom to Myers was dated June 8th, 1868. There was also introduced a patent from the United States to the State of Iowa for said land, dated December 30th, 1869. It is claimed that this proved a paramount title in said State. But said patent purported to convey said land to said State, subject to the disposal of its Legislature, as swamp and overflowed lands, under and in conformity with the swamp-land act of Congress of September 28th, 1850. This patent was evidence that the title to said land vested absolutely in said State at the date last mentioned. *French v. Fyan*, 93 U. S. 169; *Martin v. Marks*, 97 U. S. 345; *Rice v. Sioux City, etc., R. R. Co.*, 110 U. S. 695; *Allison v. Halfacre*, 11 Iowa, 450; *Edmondson v. Corn*, 62 Ind. 17.

Proof of title in the State of Iowa on the 28th of September, 1850, was not inconsistent with the existence of title in Kingsley on and before the 8th of June, 1868.

In discussing the evidence and instructions to the jury, counsel have suggested that the courts of this State can not take judicial knowledge of the grant of lands by said act of Congress to the State of Iowa. The courts of this State take judicial notice of the act of Congress. Article 6, Constitution U. S.; section 236, R. S. 1881. The plaintiff himself proved by the introduction of said patent, that the particular land in controversy was granted to the State of Iowa.

It is also insisted that when the plaintiff had proved the appellee's covenant of seizin, the burden of proof was thereby cast upon the appellee, and he was bound to prove his title.

The answer of general denial provided for by our code throws upon the plaintiff the burden of proving every material allegation of his complaint. *Lafayette, etc., R. R. Co. v. Ehman*, 30 Ind. 83.

We think that where such an answer is pleaded in an action for breach of covenant of seizin in a deed of conveyance, proof of the deed alone will not require proof of the de-

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fendant that he has not broken the covenant therein, but the plaintiff, to maintain his action, must himself prove the breach. *Ingalls v. Eaton*, 25 Mich. 32.

It being impossible that the appellant could recover under the evidence, it is not necessary for us to examine the instructions given to the jury or refused.

PER CURIAM.—The judgment is affirmed, at the costs of the appellant.

Filed Dec. 17, 1884.

No. 11,570.

LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY v. PECK.

ASSIGNMENT OF ERRORS.—*Pleading.*—*Practice.*—An assignment of error in the Supreme Court, that neither paragraph of a complaint states facts sufficient to constitute a cause of action, presents no question. Such an assignment can only be made in regard to the complaint as a whole, and if either paragraph is sufficient, such assignment will not avail to reverse the judgment.

RAILROAD.—*Killing Stock.*—*Complaint.*—In an action, under the statute, against a railroad company, for killing stock, the want of a formal averment in the complaint, that the plaintiff was damaged by the killing of his cattle, will be unavailing for any purpose after verdict.

SAME.—*Damages.*—*Evidence.*—Upon the question of damages, it is proper to allow witnesses to testify as to the value of animals before and after the injury.

PRACTICE.—*Signing Pleadings.*—Where there has been no motion before verdict to strike out or reject a pleading, because not subscribed by the party or his attorney, the defect will not be regarded on appeal.

From the Clay Circuit Court.

G. W. Friedley, for appellant.

I. N. Pierce and T. W. Harper, for appellee.

ZOLLARS, C. J.—Appellee's complaint is in two paragraphs. In the first he asks a judgment for the value of cattle that were killed, and in the second a judgment for the amount of damage to other cattle that were injured by a train of appellant's cars. The cattle entered upon the track and were killed

90	68
129	505
99	68
132	370
99	68
165	25
165	199

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at a point where the company had neglected to build and maintain a fence.

Under the two assignments of error, that the court below erred in overruling its motion in arrest of judgment, and that neither paragraph of the complaint states facts sufficient to constitute a cause of action, appellant, by its counsel, asks a reversal of the judgment because of the insufficiency of the complaint.

The assignment, that neither paragraph of the complaint states facts sufficient to constitute a cause of action, really presents no question. Such an assignment can only be made in regard to the complaint as a whole, and when properly made, as also a motion in arrest of judgment as here made, calls in question the sufficiency of the complaint as a whole. Hence, if either paragraph is sufficient, neither of the assignments here can be maintained. *Leedy v. Nash*, 67 Ind. 311; *Smith v. Freeman*, 71 Ind. 85; *Wagner v. Wagner*, 73 Ind. 135; *Elmore v. McCrary*, 80 Ind. 544; *Iles v. Watson*, 76 Ind. 359; *Jones v. Pothast*, 72 Ind. 158; *Toledo, etc., R. W. Co. v. Milligan*, 52 Ind. 505; *Spahr v. Nicklaus*, 51 Ind. 221.

The only objection urged against the first paragraph of the complaint is, that there is no formal statement that appellee was damaged by the killing of his cattle. This is not tenable, especially after verdict. In that paragraph all of the facts attending the killing, and the value of the cattle, are stated, with a prayer for judgment to the amount of the value of the cattle. This is sufficient under the statute. Section 338, R. S. 1881. This being so, the motion in arrest was properly overruled, and the assignment as to the sufficiency of the complaint can not be maintained. It is not necessary, therefore, to examine the second paragraph.

The objections urged against it, however, are not tenable here. It is said that there is no averment in that paragraph that the cattle therein mentioned were damaged. It is averred that they were run upon, and cut, crushed and injured. This is clearly sufficient after verdict. It is said further that

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this paragraph was not signed by appellee, nor by his attorney. The statute requires that pleadings shall be subscribed by the party or his attorney (section 358, R. S. 1881), but as there was no motion to strike out or reject the paragraph, and the defect is one that might have been cured by amendment below, it will not be regarded on appeal. *Lowry v. Dutton*, 28 Ind. 473; *Fankboner v. Fankboner*, 20 Ind. 62; *Harris v. Osenback*, 13 Ind. 445; *Lentz v. Martin*, 75 Ind. 228.

If the complaint were defective in the particulars pointed out, they were such defects as would clearly be cured by the verdict. See *Baltimore, etc., R. R. Co. v. Kreiger*, 90 Ind. 380; *Louisville, etc., R. W. Co. v. Harrington*, 92 Ind. 457; *Hartlep v. Cole*, 94 Ind. 513.

Upon the trial of the cause, some of appellee's witnesses were allowed to testify as to the value of the cattle, mentioned in the second paragraph of the complaint, before and after the injury. It is conceded, in argument, that this was a proper mode of arriving at the amount of damages suffered by appellee. It is the mode sanctioned in the case of *Yost v. Conroy*, 92 Ind. 464.

It is contended, however, that the questions to the witnesses, and their answers, were not limited to times immediately before and after the injury of the cattle. There are two sufficient answers to this. In the first place, the evidence clearly shows that the questions and answers had reference to the value, so immediately before and after the injury, as to remove all ground for appellant's contention; and, in the second place, no such objections were made in the court below. In fact the objections were so general as to present no question akin to that urged here. See *Harvey v. Huston*, 94 Ind. 527; *Jones v. Angell*, 95 Ind. 376, and cases cited.

These are the only questions discussed by appellant's counsel, and as in such case the ruling must be against them, the judgment is affirmed, with costs.

Filed Dec. 10, 1884.

Surber v. The State.

No. 11,727.

SURBER v. THE STATE.

CRIMINAL LAW.—Manslaughter.—Indictment.—Duplicity.—An indictment, charging that the defendant at, etc., on, etc., did unlawfully and feloniously, without malice, involuntarily kill A. by shooting, etc., the defendant then and there being in the commission of an unlawful act, to wit, drawing a deadly weapon, to wit, a revolver, upon A., and not in defence of his person or property, or of those entitled by law to his protection, whereby, etc., shows an involuntary killing without malice, while committing an unlawful act, and is good as a charge of manslaughter, and is not bad for duplicity.

SAME.—Evidence.—Declarations.—Res Gestæ.—Declarations of others, in the presence of the accused, immediately following the fatal act, are part of the *res gestæ*, and admissible in evidence against the accused.

SAME.—Practice.—Instructions.—Instructions asked after the argument begins may be refused without error.

SAME.—Attorneys.—Counsel may be called in behalf of the State to assist the prosecuting attorney, and the argument may be opened either by such counsel or by the prosecuting attorney.

SAME.—Involuntary Killing while Engaged in Commission of Unlawful Act.—Our statute makes it an offence to draw a deadly weapon upon another, and a person who does this commits an unlawful act, and if death results he is guilty of felonious homicide.

SAME.—Voluntary Drunkenness.—The voluntary drunkenness of the defendant does not change the unlawful character of the act of purposely pointing a loaded pistol at another.

From the Morgan Circuit Court.

W. R. Harrison, W. E. McCord, G. W. Grubbs and M. H. Parks, for appellant.

F. T. Hord, Attorney General, *F. P. A. Phelps*, Prosecuting Attorney, and *W. B. Hord*, for the State.

ELLIOTT, J.—The fourth count of the indictment upon which the judgment of conviction rests charges that "the defendant did unlawfully, feloniously, and without malice, express or implied, and involuntarily kill one Thomas Burgess, by then and there shooting him, the said Thomas Burgess, in and upon the head with a certain revolver, loaded with gunpowder and leaden ball, which he, the said George Surber, then and there had and held in his hand, while he, the said

99	71
137	25
99	71
149	698
162	217
99	71
1169	507

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George Surber, was then and there in the commission of an unlawful act, to wit, unlawfully drawing a certain dangerous and deadly weapon upon the said Thomas Burgess, then and there being, he, the said George Surber, not then and there drawing said dangerous and deadly weapon, to wit, said revolver, in defence of his person or property, or in defence of those entitled to his protection by law, whereby, and by means of said unlawful drawing of said revolver, as aforesaid, upon the said Thomas Burgess, said revolver was discharged at, against and upon the head of the said Thomas Burgess, then and there being, and him, the said Thomas Burgess, did then and there mortally wound, and of which wound so inflicted, as aforesaid, the said Thomas Burgess did then and thereafter languish, and, so languishing, did thereafter, on the 26th day of January, 1883, die."

The principal point made against this count of the indictment is, that it does not show that the appellant was engaged in the perpetration of an unlawful act at the time he killed the deceased. We think this position is not tenable. It is made a criminal offence for any person to draw a deadly or dangerous weapon upon another, and the indictment clearly shows that the killing was done while the appellant was engaged in drawing a dangerous and deadly weapon upon the man slain by him. R. S. 1881, section 1984.

The indictment is not bad for duplicity. It charges but one unlawful act and one killing while engaged in the commission of that act, and these are elements of a single crime. The averment that the appellant did unlawfully and feloniously shoot the deceased is not a separate and distinct charge; it is but a part of the substantive charge embodied in the whole count, considered, as it must be, as an entirety. Nor is the averment inconsistent with the allegations with which it is associated, for it is perfectly consistent to affirm that a defendant did shoot the deceased, although he did it involuntarily. Whatever the manner of the shooting, the fact remains that the defendant did do it.

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The State was permitted to introduce the testimony of Mary Lapossa, that "After the shot had been fired, and Thomas Burgess had been shot and fallen, and the defendant had approached the body of the deceased, and had drawn his coat, and inquired 'who shot deceased?' and put his hand back to his pocket at the hip, some person in the room where the deceased was shot and had fallen called out that the girls—there were some half dozen girls and about a dozen men in the room—had better go in the kitchen, as the defendant might shoot somebody else." We have no doubt that this testimony was competent.

What a bystander says during an occurrence, and in the presence of the actors, is competent as part of the *res gestæ*. *Baker v. Gausin*, 76 Ind. 317; *Wood v. State*, 92 Ind. 269. In this instance the transaction had not fully closed; there was, as appears from the testimony of some of the other witnesses, no perceptible interval between the shooting and the statements of the bystander. In the testimony we have quoted, it appears that the transaction was a continuous one, for the appellant was still a prominent actor in the affair. *Puett v. Beard*, 86 Ind. 104.

The testimony was competent as tending to establish an admission on the part of the accused. The question which he asked was followed by the statement of the bystander charging him with having shot the deceased, and as he did not deny the charge, some grounds for an inference against him were established. It may be that the evidence was weak, but nevertheless it was evidence tending to establish a relevant fact. It is a familiar elementary principle, that silence, when the accused is under no restraint and at full liberty to speak, may sometimes be regarded as a tacit admission. At all events all such matters are proper for the consideration of the jury. *Pierce v. Goldsberry*, 35 Ind. 317; *Puett v. Beard*, *supra*.

It is not error for the court to refuse to give instructions asked after the argument has commenced. R. S. 1881, sec. 1823.

The State may be represented by counsel called in to assist

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the prosecuting attorney. *Wood v. State, supra*. It is not material whether the argument is opened by the prosecuting attorney or by counsel associated with him, and instructions asked after the argument has begun, whether opened by the prosecuting attorney or his associate, are not seasonably requested.

We are earnestly asked to reverse upon the evidence, and, impressed by the earnestness of counsel, we have given the testimony a careful examination. The deceased was killed at the house of Joseph Lapossa to which he had gone in company with the accused to attend a dancing party. Both had been drinking whiskey, and the appellant was intoxicated. No witness saw the pistol drawn or fired, but many testified that the shot came from the part of the room where the accused was sitting. He was the first to reach the deceased after he had fallen, and, according to the testimony of several witnesses, simulated violent grief. The two men were often together, and yet there is evidence of violent and threatening language used by the accused to the deceased.

Stephen Chenoweth testified that he was a justice of the peace, and that on the night the shooting took place the accused came to him and had with him a conversation respecting the occurrence. We copy from the record the material part of the testimony of this witness: "He came to me the same night and asked me who I was going to have arrested. I said I wasn't going to have anybody arrested. He said, 'You can't arrest me, for I wasn't in the house at the time of the shooting.' Afterwards, the same night, he came to me and said he was mistaken, had just come in the door when the shooting occurred. After that, on same night, he said: 'Yes, I was in the house; was sitting in Grant Ogle's lap when the shot was fired.' I had heard nothing about arresting any one at that time. At the court of inquiry he testified that the shot came from the southeast corner of the room. After that and at the preliminary trial, he testified that the shot came from the northwest corner of the room."

James Summers testified that after the inquest he said to

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the accused: "Buck, you were mistaken when you said the shot came from the southeast corner of the room. He said he guessed he was; that it came from the northwest corner of room, and so testified afterwards." Many witnesses testified that the shot came from the northwest corner of the room near where the accused was, and one witness, at least, testified that he saw the fire and smoke "close to where Grant Ogle and the defendant were sitting." The accused had a pistol in his hip pocket at the time Burgess was killed, and several witnesses testify that they saw him immediately after the shooting with his hand on his hip pocket, and that he said, "Who in the hell shot Tom Burgess?" James Dorsett testified that the defendant took hold of the head of the deceased and shook it two or three times, and, prefacing his statement with an oath, said, "take that." William Hazlett was arrested for the same offence as that charged against the appellant, and while they were both in jail the latter said, as two or three witnesses testify: "William Hazlett never did the shooting, and never saw the revolver that did it." Testimony was given by three or four witnesses of a statement by the appellant, that "he had one little racket, and one shot settled it." And one of these witnesses stated that the appellant afterwards took him, the witness, into an alley, and said, "Don't say anything about it," and asked if he needed any money. At the time these last conversations took place, the accused had been, as one of the witnesses expressed it, "drinking enough to turn his tongue loose." The appellant contradicted all of the witnesses who testified as to admissions made by him, and also testified that he did not do the shooting. He introduced evidence tending to show that the shooting was done by Hazlett, but the evidence upon this point was either explained away or disposed of by contradiction from other witnesses.

The circumstances very satisfactorily establish the fact that the pistol was fired by some one either directly in or very near the position occupied by the appellant, and his admissions and conduct point to him as the person who used the

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weapon. The direction which the ball took, and the course it followed into the brain of the deceased, show that it was not discharged while in the pocket of the appellant. It must, therefore, have been discharged while in his hands and in front of him, for it could not otherwise have gone in the direction it did. If the pistol was discharged while in the hands of the appellant, it was justly inferable that he did draw it upon the deceased in a spirit of drunken bravado, and, if he did do this, he was justly condemned. It seems to us that the evidence would have sustained a graver charge against the appellant than that of which he was found guilty, for there is evidence strongly tending to prove that he did the shooting purposely.

Our statutes are intended to require all persons to be exceedingly cautious and careful in the use and handling of fire-arms, and one who purposely draws upon another a gun or pistol does an unlawful act, and is guilty of felonious homicide if death results from the act, unless, indeed, the act of pointing the weapon is justifiable or excusable upon some legal ground. *Lange v. State*, 95 Ind. 114.

Voluntary drunkenness is no excuse for crime. *Goodwin v. State*, 96 Ind. 550, and auth. cited. It can not avail the appellant that he did the unlawful act in the spirit of mere drunken bravado. Human life can not be so cheapened as to permit voluntary drunkenness to shield an accused person who, in the commission of an unlawful act, unintentionally takes another's life.

It is clear that the case before us is not one which will justify a departure from the long established rule of this court, never to undertake to determine the credibility of witnesses, or to interfere with the verdict of a jury upon the evidence, except in the plainest and strongest cases of a disregard or misapplication of the evidence by the jury.

Judgment affirmed.

Filed Dec. 17, 1884.

The State, *ex rel.* Hines, Auditor, v. Levi *et ux.*

No. 11,541.

THE STATE, EX REL. HINES, AUDITOR, v. LEVI ET UX.

COUNTY AUDITOR.—*School Fund Mortgage.—Public Policy.—Breach of Official Bond.*—A mortgage, executed by a county auditor to secure a loan of a part of the common school fund made to himself, is valid or invalid at the option of those having a supervisory control of such fund. The loan is unlawful as against public policy, and is a breach of the auditor's official bond; but the mortgage may, both as to the auditor and those claiming under him, be resorted to and enforced, as a means of reimbursing the fund, looking only to the auditor and his sureties for any deficiency that may remain after the mortgaged land has been exhausted. *Ware v. State, ex rel.*, 74 Ind. 181, limited.

From the Hamilton Circuit Court.

A. F. Shirts and W. R. Fertig, for appellant.

W. Garver, F. B. Pfaff and F. M. Trissal, for appellees.

NIBLACK, J.—Complaint by the State, on the relation of Hines, auditor of Hamilton county, against Thomas Levi and Mary J. Levi, his wife, to foreclose a school fund mortgage. It was charged by the complaint that, on the 12th day of April, 1872, one Elisha Mills was the auditor of said county of Hamilton, and being desirous of obtaining a loan of \$1,000 from the common school fund under his charge, drew his warrant on the treasurer of said county for that sum, less one year's interest in advance, upon which he received out of said common school fund the sum of \$920 as the principal sum remaining after paying one year's interest in advance; that the said Mills thereupon made his note, in the usual form of a school fund note, to the State, binding himself to repay said sum of \$1,000 at the end of five years, with interest annually in advance, and, together with his wife, at the same time executed a mortgage to the State on an eighty-acre tract of land in Hamilton county to secure the payment of said note; that the said Mills, on the 24th day of April, 1872, caused said mortgage to be duly recorded in the proper mortgage record of said county, and to be placed on file in his office with the

99	77
145	511
99	77
164	138

The State, *ex rel.* Hines, Auditor, *v.* Levi *et al.*

other school fund mortgages kept therein ; that, on the 30th day of November, 1874, Mills and wife sold, and by warranty deed conveyed, the tract of land mortgaged by them as above to one Levi H. Cook, subject to said mortgage, which he, the said Cook, assumed to pay as a part of the purchase-money to be paid for said land ; that, on the 14th day of February, 1877, Cook sold and conveyed sixty acres of said tract of land to one Mary J. Levi, and the remainder of the said tract to her husband, Thomas Levi, subject to the same mortgage which the said Thomas Levi assumed to pay as a part of the purchase-money for said land, with the knowledge and consent of the said Mary J. Levi ; that, on the 16th day of December, 1878, the said Thomas Levi and Mary J. Levi conveyed the entire tract of land to one William E. Lowther, who, in turn, reconveyed said land to the said Thomas and Mary, as husband and wife, jointly ; that said two last named conveyances were made without any consideration whatever, the object in executing them being to put the land into the hands of the said Thomas and Mary jointly as tenants by entirety.

The circuit court sustained a demurrer to the complaint and rendered final judgment upon demurrer for the defendants, upon the ground, as counsel inform us, that this court had held in the case of *Ware v. State, ex rel.*, 74 Ind. 181, that a loan of common school funds made by a county auditor to himself is void, and that it necessarily followed that a mortgage given to secure such a loan could not be enforced. The case thus relied upon was an action by the State, on the relation of the board of county commissioners, against a former county auditor, upon his official bond, for the making of a pretended loan of \$1,000 of the common school fund to himself, whereby, as was alleged, that amount of said fund was converted to his own use. The auditor's sureties answered, setting up the three years' statute of limitation in bar of the action as to them, and whether the facts as found by the court below sustained the defence, thus interposed by

The State, *ex rel.* Hines, Auditor, *v.* Levi *et al.*

the sureties, was the only question really considered by this court at the hearing. The remark contained in the opinion then announced, that the loan, which the auditor made to himself in that case, would, in any event, have been regarded as void, was consequently only incidental, as well as collateral, to the controlling question involved in the cause, and ought to be construed as meaning only that, as a defence to that action, the mortgage executed by the auditor was immaterial and ineffectual, without reference to the formula which might have been observed in executing it.

We have since considered more carefully and more directly the question of the validity of a mortgage executed by a county auditor to secure a loan of the common school fund made to himself, and have come to the conclusion that such a mortgage is valid or invalid at the option of those having a supervisory control of the common school fund; that the loan of any part of that fund to himself by a county auditor is unlawful as against public policy, and hence a breach of his official bond, but that those having a supervisory control, referred to as above, may, at their option, resort to and enforce a mortgage executed to secure such a loan as a means of reimbursing the fund, looking only to the auditor and his sureties for any deficiency that may remain after the mortgaged lands have been exhausted. To that conclusion we still adhere, and as those representing the State in this action have elected to proceed upon the mortgage, it must be regarded, for the purposes of this case, as a regularly executed common school fund mortgage, and as, therefore, binding upon Mills as well as those claiming under him. It follows that the circuit court erred in sustaining a demurrer to the complaint, and that for that reason the judgment below ought to be reversed.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

Filed Dec. 16, 1884.

Ritter v. Cost.

No. 9548.

RITTER v. COST.

99	80
130	310
99	80
130	630

SUBROGATION.—*Satisfied Mortgage.*—*Purchaser for Value of Judgment.*—*Equal Equities.*—The equity of the purchaser for value of a judgment, which is a lien upon certain real estate, is at least equal to the equitable claim of the owner of such real estate to be subrogated to the rights of the mortgagee in a mortgage thereon, which had been paid off and satisfied, and of which the purchaser of the judgment had no actual knowledge, and where the equities are equal the law must prevail. ELLIOTT, J., dissents, but HOWK and ZOLLARS, JJ., for reasons stated, are of opinion that, upon the facts specially found, no case was made for subrogation in any event.

VENDOR AND VENDEE.—*Real Estate.*—*Judgment Lien.*—*Notice.*—*Value of Improvements.*—The purchaser of real estate is affected with constructive notice of any judgment lien thereon, and if, without actual knowledge of such lien, he buys the real estate and makes valuable improvements thereon, it is his misfortune, and not the fault of the owner of the judgment, and he is not entitled to be repaid the value of such improvements before the lien of such judgment can be enforced.

SAME.—*Execution.*—*Sale in Parcels.*—*Enforcement of Lien Against Parcels.*—*Rule in Equity.*—*Sheriff's Duty.*—Where real estate, which is subject to the lien of a judgment, is sold and conveyed in parcels to different purchasers at different times, and afterwards an execution is sued out for the enforcement of such judgment lien, it is the duty of the proper sheriff, in analogy to the rule in equity in like cases, to offer for sale the several parcels of such real estate, in the inverse order in which the same had been previously sold and conveyed; and where this has been done, and there has been no sale for the want of bidders, and the execution remains unsatisfied, it then becomes the duty of the sheriff to offer and sell, if he can, the parcel of such real estate first sold and conveyed, and the sale thus made by the sheriff is legal and valid.

From the Superior Court of Marion County.

J. Buchanan, L. Ritter and B. W. Ritter, for appellant.

H. W. Harrington, A. G. Howe, G. Carter and J. N. Binford, for appellee.

HOWK, J.—The issues joined in this cause were tried by the court, at special term, and at the request of the appellant, the plaintiff below, the court made a special finding of facts and stated its conclusions of law thereon, in substance, as follows :

"On the 6th day of May, 1872, one Solomon P. Stern was the owner in fee simple of the property hereinafter described, he having before that time purchased the same of Julian and Johnson, and executed to them, to secure the purchase-money therefor, certain notes secured by mortgage, upon which there was then due \$1,400. On the date last above mentioned said Stern, by warranty deed, sold and conveyed said real estate to one Downey, who, as part of the consideration for the sale to him, agreed to assume and pay, and afterwards did pay, the said notes and mortgage executed by said Stern to said Julian and Johnson; said agreement of assumption was not contained in said deed, but was made verbally. Said Downey afterwards subdivided said real estate into lots, numbered from 1 to 12 inclusive, and sold and conveyed the same, the lot now owned by plaintiff, and described in his complaint, to wit, lot No. 4, being the lot first conveyed, plaintiff becoming the owner of the same through divers mesne conveyances. The plaintiff and those through whom he claims, immediately after the conveyance of said lot 4 by said Downey, went into and have ever since been in possession thereof, and made valuable and lasting improvements thereon, of the value of about \$731.

"On April 11th, 1872, one Parker recovered a judgment against said Stern for \$162.15, drawing 6 per cent. interest, which became and continued to be a lien upon all of said real estate, so as aforesaid purchased by said Stern of said Julian and Johnson. On October 28th, 1879, the defendant who had, by divers mesne assignments and for a valuable consideration, become the owner of said judgment, caused execution thereon to issue, and the twelve lots hereinbefore mentioned to be levied upon under said execution. Prior to the sale by the sheriff the plaintiff notified the defendant that his lot had been first sold and conveyed by said Downey, and demanded that the other eleven lots be first exhausted; and thereupon the sheriff, by order of defendant, offered each lot and sold said

Ritter v. Cost.

lot 4 in the order set forth in his return to said execution, in the words and figures following :

“I did, on said day, at the door of the court-house of said county, between the hours prescribed by law, at public auction, first expose to sale the rents and profits for a term not exceeding seven years, of said lots Nos. 1, 2, 3, 5, 6, 7, 8, 9, 10, 11 and 12 separately and in the order herein set forth, and received no bid for either of said lots. I then and there offered at public auction, as aforesaid, the rents and profits of all of said lots Nos. 1, 2, 3, 5, 6, 7, 8, 9, 10, 11 and 12 together and as a whole, and received no bid therefor. I then and there offered, at public auction as aforesaid, the rents and profits of lot No. 4, and received no bid therefor. I then and there offered, at public auction as aforesaid, the rents and profits of all of the above described real estate together and as a whole, and received no bid therefor. I then and there offered, at public auction as aforesaid, the fee simple of lots Nos. 1, 2, 3, 5, 6, 7, 8, 9, 10, 11 and 12 separately and in the order above set forth, and received no bid therefor for either of said lots. I then and there offered, at public auction as aforesaid, the fee simple of all of said lots 1, 2, 3, 5, 6, 7, 8, 9, 10, 11 and 12 together and as a whole, and received no bid therefor. I then and there offered, at public auction as aforesaid, the fee simple of said lot No. 4, and George P. Cost did then and there bid the sum of three hundred and thirteen dollars and thirty-four cents, and, no person bidding more, the same was in due form openly struck off to the said George P. Cost, he being the highest and best bidder therefor, and that being the highest and best price bid for the same.’

“The George P. Cost last mentioned is the defendant herein. Said sheriff’s sale was duly advertised and regular in all respects. At the time when said Downey bought, and at the time when he paid for said real estate, and at the time when the plaintiff, and those through whom he claims, bought said lot and made said improvements thereon, neither they nor any of them had any actual knowledge of the said judgment against

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said Stern; and at the time when defendant, and those through whom he claims, purchased and paid for said judgment, neither they nor any of them had any actual knowledge of said mortgage, executed by said Stern to said Julian and Johnson.

“Upon the foregoing facts, the court finds and states the following *conclusion of law*:

“That the foregoing facts are not sufficient to constitute any cause of action in favor of the plaintiff against the defendant herein.”

Over the appellant's exception to such conclusion of law, the court at special term rendered judgment, that he take nothing by his suit, and that appellee recover of him his costs in this action expended. On appeal from this judgment to the court in general term, the only error there assigned by the appellant was, that the court at special term erred in its conclusion of law upon the facts specially found. The judgment at special term was affirmed by the court in general term, and from this judgment of affirmance this appeal is now here prosecuted. By proper assignment the appellant has brought before this court the same error of which he complained in the court below, in general term.

In their argument of this cause, the appellant's counsel have stated the grounds upon which they rely for the reversal of the judgment below, in substance, as follows.

“1st. That the judgment against Stern was only a lien upon such interest as Stern had in the land (before subdivision), and that the lien of Julian and Johnson for the purchase-money of said land (the amount evidenced by the mortgage) was a superior lien to that of the judgment against Stern; that Downey and his grantees, having paid said mortgage without knowledge of said judgment, were entitled to be subrogated to the rights of Julian and Johnson as against the defendant, and to insist that, before defendant could enforce any lien of said judgment against said land, he must first pay the lien for the purchase-money, with interest, or sell subject to that lien.

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"2d. Also, that as the improvements on said lot No. 4 were made by plaintiff and his grantors, in good faith, under color of title and in the belief that they had good title, and without knowledge of the Parker judgment, they were entitled to be repaid said sum so laid out, to wit, \$731, before defendant could enforce the lien of his said judgment.

"3d. That the sale of this lot was invalid, because the other lots sold by Downey *after* his sale of this one, were not first exhausted. It was not sufficient that they were *offered* merely; they must be sold."

Upon the facts specially found by the trial court, we are of the opinion that the appellant is not in a position where he can successfully claim the benefit of the equitable doctrine of subrogation in aid of his cause of action against the appellee. Certainly, the appellant is in no better position than Downey, the original purchaser of the undivided land from Stern. As the remote grantee of Downey, the appellant occupied the precise position of Downey, and none other or better in relation to the purchase-money mortgage. Conceding, therefore, without deciding, that under ordinary circumstances, and in the absence of any intervening rights and equities, the appellant, as the remote grantee of Downey, might have been subrogated to the rights of the mortgage creditors, it is very clear, we think, that under the facts of this case, neither Downey nor the appellant would have been or were entitled to such subrogation as against the appellee. The court found specially that when the appellee, and those through whom he claimed, purchased and paid for the Parker judgment, neither they nor any of them had any actual knowledge of the mortgage executed by Stern to Julian and Johnson; and no facts were found by the court from which it could be inferred that they or any of them had constructive notice even of the existence of such mortgage. Upon these facts, it is apparent that the appellee purchased and paid for the Parker judgment without notice of any kind of the purchase-money mortgage, or of the appellant's claim to be

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subrogated thereto. His equity is at least equal to that of the appellant; and the "maxim is, that where there is equal equity, the law must prevail. And this is generally true; for, in such a case, the defendant has an equal claim to the protection of a court of equity for his title, as the plaintiff has to the assistance of the court to assert his title; and then, the court will not interpose on either side; for the rule there is, '*In æquali jure melior est conditio possidentis.*' And the equity is equal between persons, who have been equally innocent and equally diligent." 1 Story Eq., section 64c. This equitable doctrine has been recognized and acted upon by this court in cases somewhat similar to the one at bar, where mortgage creditors have sought to enforce alleged equities against the purchasers for value of existing judgments. *Flanders v. O'Brien*, 46 Ind. 284; *Busenbarke v. Ramey*, 53 Ind. 499; *Wainwright v. Flanders*, 64 Ind. 306; *Tuttle v. Churchman*, 74 Ind. 311; *Rooker v. Rooker*, 75 Ind. 571.

These cases seem to us to be decisive of the case in hand, upon the question under consideration, adversely to the appellant. They show very clearly that upon the facts found by the court, he can not claim to be subrogated to the purchase-money mortgage, as against the appellee. It follows that the first ground assigned by appellant, for the reversal of the judgment, can not be sustained.

- The writer, speaking for himself, and not for the court, is of opinion that, upon the facts found by the court, no case was made for subrogation in any event. The court found that Downey purchased the undivided land, and agreed, as part of the consideration of the sale to him, to assume and pay, and afterwards did pay, the purchase-money notes and mortgage, executed by Stern to Julian and Johnson. Under his agreement of assumption, it would seem to be clear that Downey became and was, in equity, primarily liable for the payment of the notes and mortgage; that, although not a party to either of the instruments in their inception, they became and were, under his contract to assume and pay them,

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the equitable evidence of his personal debt; and that, as between himself and the maker of the notes and mortgage, he became and was, in equity, the principal debtor, while Stern was only his surety. This was the doctrine declared in *Josselyn v. Edwards*, 57 Ind. 212, and it has been repeatedly recognized, approved and acted upon, and has never been questioned in the later decisions of the court. *Hoffman v. Risk*, 58 Ind. 113; *Kester v. Hulman*, 65 Ind. 100; *McClure v. Andrews*, 68 Ind. 97; *Smith v. Ostermeyer*, 68 Ind. 432; *Risk v. Hoffman*, 69 Ind. 137; *Gerber v. Sharp*, 72 Ind. 553; *Sidener v. Pavey*, 77 Ind. 241; *Durham v. Craig*, 79 Ind. 117.

In the opinion of the writer, Downey's contract was that he would assume and pay, and he afterwards did pay, the notes and mortgage, executed by Stern to Julian and Johnson. His contract, fairly construed, was to pay off, to satisfy, to extinguish, *not* to keep alive, Stern's notes and mortgage. He paid the notes and mortgage, and, in so doing, he merely paid off his own personal debt, for which under his contract he was primarily liable as the principal debtor. No facts were found by the court from which it can possibly be inferred that, in making such payment, he had any purpose or intention of keeping alive the notes and mortgage. It must be assumed therefore, the writer thinks, that by his payment he intended to and did extinguish both the debt and the security.

From this conclusion, it follows necessarily that Downey could not have asked a court of equity to revivify the mortgage security after it had become *functus officio* by his voluntary payment thereof, and to subrogate him to the rights of the mortgage creditors. And if, upon the facts, he could not have claimed such equitable relief, and surely he could not, it is very certain that his grantees, near or remote, could not be entitled to any such relief. The writer is of opinion, therefore, that the first ground upon which the appellant relies for the reversal of the judgment below, is not tenable and can not be sustained. *Richmond v. Marston*, 15 Ind. 134.

2. The second ground upon which a reversal is asked is,

that the appellant was entitled to be repaid the value of the improvements made upon the lot by him and his grantors, before the appellee could enforce the lien of his judgment against such lot. It is claimed that these improvements were thus made in good faith, under color of title, and in the belief that appellant and his grantors had good title, and without knowledge of appellee's judgment. Conceding all these matters to be true as stated, they constitute no valid or legal claim in appellant's favor against the appellee, for the value of such improvements, nor are they sufficient to show that the appellee ought not to be permitted to enforce the lien of his judgment against appellant's lot before he had been paid the value of the improvements. The appellant had constructive notice of appellee's judgment, and if he and his grantors did not have actual notice of the existence of the judgment, it was their misfortune, and not the fault of the appellee. The appellant's claim on this point can not be sustained. *Taylor v. Morgan*, 86 Ind. 295.

3. The last reason for which we are asked to reverse the judgment is, that the sale of the appellant's lot was invalid, because the other lots sold by Downey after the sale of appellant's lot, were not first exhausted. It was not enough that the other lots were offered merely; they must be actually sold before a legal sale could be made of the appellant's lot. We may well suppose that this point was not made below, but is presented here for the first time. In support of appellant's position his counsel cite the cases of *Houston v. Houston*, 67 Ind. 276, *Edwards v. Applegate*, 70 Ind. 325, and *Hahn v. Behrman*, 73 Ind. 120. It is evident, however, that the precise question here presented was not considered or decided in either of the cases cited, although there are expressions in the opinion in each of the cases, which, if not limited, as they should be, to the facts of the case in hand, would seem to sustain the appellant's position. In the case now before us, it is shown that the sheriff, by the appellee's order, in part compliance at least with the equitable doctrine invoked by the ap-

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pellant, offered first for sale each of the other lots, and received no bid therefor; and that he then, and not before, offered and sold the appellant's lot. The question for decision is this, was the sheriff compelled not only to offer but to sell and exhaust each of the other lots before he could make a legal and valid sale of the appellant's lot?

We think that this question ought to be, and must be, answered in the negative. It was the duty of the sheriff to make the money due on the execution. In compliance with the equitable rule referred to, in so far as he could comply therewith, he offered for sale each and all of the other lots and received no bid therefor. Having done this, which was all he could do, in attempted compliance with such rule, we think that it became his duty to offer and sell, if he could, the appellant's lot, and that the sale thus made was legal and valid. *Merritt v. Richey*, 97 Ind. 236.

The court did not err in its conclusion of law.

The judgment is affirmed, with costs.

ZOLLARS, J., concurs with the personal views of HOWK, J., in the above opinion.

Filed Mar. 17, 1883.

DISSENTING OPINION.

ELLIOTT, J.—I think Ritter was entitled to be subrogated to the rights of the mortgagee to whom the purchase-money mortgage was executed. *Peet v. Beers*, 4 Ind. 46; *Spray v. Rodman*, 43 Ind. 225; *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y. 38; *Sickles v. Flanagan*, 79 N. Y. 224; *Monticello, etc., Co. v. Loughry*, 72 Ind. 562, 566; *Ayers v. Adams*, 82 Ind. 109.

The lien of appellee's judgment was only on the execution debtor's equity of redemption, and Ritter, in asserting his right to avail himself of the purchase-money mortgage, leaves the lien as it was, and as his is the superior equity, that of a *bona fide* purchaser for full value, it should prevail. *Glidewell v. Spagh*, 26 Ind. 319; *Monticello, etc., Co. v. Loughry*, *supra*;

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Manns v. Brookville Nat'l Bank, 73 Ind. 243; *Sharpe v. Davis*, 76 Ind. 17.

The rights acquired by appellee were not greater than those owned by the person through whom he derived them all. *Rawson v. McJunkins*, 27 Ga. 432; *Colquitt v. Bonner*, 2 Ga. 155; *Scott v. Harkins*, 32 Ga. 302; *Himes v. Barnitz*, 8 Watts, 39; *Blydenburgh v. Thayer*, 1 Abb. Dec. 156; *De La Vergne v. Everton*, 19 Am. Dec. 411; *Graves v. Woodbury*, 4 Hill, 559; *Chamberlin v. Day*, 3 Cow. 353; *Lockwood v. Bates*, 12 Am. Dec. 121; *Independent School Dist. v. Schreiner*, 46 Iowa, 172; *Burtis v. Cook*, 16 Iowa, 194; *Rea v. Forrest*, 88 Ill. 275; *Padfield v. Green*, 85 Ill. 529; *Jeffries v. Evans*, 6 B. Mon. 119; *Pierce v. Bent*, 69 Maine, 381; *Selz v. Unna*, 6 Wall. 327; *Harrison v. Andrews*, 18 Kan. 535, see auth. p. 542; *Swartz v. Stees*, 2 Kan. 236; *Downer v. South Royalton Bank*, 39 Vt. 25; *Finn v. Corbitt*, 36 Mich. 318; *Banning v. Edes*, 6 Minn. 402.

Filed Mar. 17, 1883. Petition for a rehearing overruled Dec. 11, 1884.

 No. 11,667.

BARTON v. THE STATE.

INTOXICATING LIQUOR.—*Sale by Druggist on Sunday.*—A druggist is liable to fine for selling liquor on Sunday to a person without a physician's prescription, although the liquor may be purchased and used for medicinal purposes, and this fact is known to the druggist at the time of the sale.

From the Rush Circuit Court.

J. W. Study, for appellant.

F. T. Hord, Attorney General, *M. D. Tackett*, Prosecuting Attorney, and *W. B. Hord*, for the State.

ZOLLARS, C. J.—Appellant was convicted upon a charge of having sold intoxicating liquor on Sunday to a person who did not have a written prescription therefor from a practicing physician, as required by section 2099, R. S. 1881. There is

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no controversy about the facts. The evidence shows that appellant was a physician and druggist; that as such druggist he sold the liquor on Sunday to a person who did not have such a prescription; that the liquor was purchased for and used by the wife of the person purchasing it for medicinal purposes; that appellant was informed at the time that it was wanted for his wife to be used for such purposes; that he knew that she was a person of a nervous temperament, and in the habit of using quinine and whiskey. In this instance, however, there was no quinine in the liquor. The evidence thus clearly brings the case within the letter of the statute.

Appellant contends, however, that as the liquor was sold in good faith for medicinal purposes, the case is not within the spirit of the law. In support of this contention, we are cited to the case of *Nixon v. State*, 76 Ind. 524, as being conclusive.

That was a prosecution against a druggist for having sold intoxicating liquors without a license. The court followed previous cases, in excepting from the operation of the statute requiring a license, sales made in good faith for medicinal purposes.

The spirit and intent of the statutes requiring a license to sell intoxicating liquors were to regulate and curtail the sale of such liquors, and lessen intoxication, and not to prohibit the sale for medicinal purposes. The case of *Nixon v. State*, *supra*, and the cases there cited, rest upon this interpretation.

This reasoning can not be applied to the case before us. The purpose of sections 2098 and 2099, R. S. 1881, is to protect the Sabbath day, and the other days therein named, from the evils that might result from the sale of intoxicating liquors. The section is an absolute inhibition upon the sale of such liquors on the days named, to be drunk as a beverage.

It seems to recognize the right of druggists to sell such liquors for medicinal purposes, but imposes a condition upon such sales on Sunday and the other days named, and that is, that the sale shall be made only to those who may have procured a written prescription therefor from a regular

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practicing physician of the county. The intention is to prohibit the sale on those days except in cases of sickness. And in order that this intention shall not be thwarted by feigned sickness, the prescription is required; and that there may be no imposition here, the physician must be a regular practicing physician; and still further to guard against imposition, the physician must be of the county where the liquor is to be sold, so that the druggist and the authorities may the more likely have a personal acquaintance with him. This condition is the barrier erected about the sale by druggists on those days. To hold that the sale may be made on those days without the prescription, would be to override and break down that barrier. Such a holding would be in conflict with both the spirit and letter of the statute. It would carry us beyond the boundaries of interpretation and construction, into the domain of legislation.

The argument, that cases of emergency may arise where it may be inconvenient, if not impossible, to procure such a prescription in time to prevent serious consequences, may have force when addressed to legislators, but it can not be controlling with courts, whose duty it is declare the law as enacted by the law-making branch of the government.

The judgment is affirmed, with costs.

Filed Dec. 16, 1884.

No. 11,099.

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124	213

FORT WAYNE, CINCINNATI AND LOUISVILLE RAILROAD COMPANY v. HERBOLD.

RAILROADS.—*Killing Stock.*—*Fencing.*—*Highway.*—Where cattle enter upon the track of a railroad at a highway, at a place where it is the duty of the company to maintain a fence, and are killed or injured, the company is liable if there was no secure fence.

SAME.—If the place is one that can not be fenced without interfering with the business of the company in the discharge of its duty to the public, or is one which can not be fenced without interfering with the use of a

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highway, or where a fence would endanger the safety of employees in the management and running of its locomotives and trains, the company is not required to fence.

SAME.—Cattle-Guards.—Where cattle-guards are necessary to prevent animals from entering upon the track from a highway, and fences can not be maintained, it is the duty of the company to maintain proper cattle-guards, provided it does not interfere with the duty the company owes to the public and the safety of its employees.

SAME.—Burden of Proof.—In an action for damages for stock killed, the burden of showing that the place is one which can not be fenced, under the above conditions, is upon the railroad company.

SAME.—Liability.—Where, at a highway crossing, cattle-guards are placed sixty feet from the boundary of the highway, and it is not shown by the railroad company that the guards, if placed at the boundary of the highway, would interfere with the use of the highway or endanger the safety of persons operating or managing the trains, or would obstruct the transaction of the company's business, or the discharge of its duty to the public, it is liable under the statute for animals killed by its engines or cars, and which entered upon its track from the unfenced space between the highway and the cattle-guards. That it would be difficult or expensive to enclose is no excuse.

From the Delaware Circuit Court.

W. H. Coombs, R. C. Bell, S. Morris, O. J. Lotz and F. Ellis, for appellant.

C. W. Moore and G. H. Koons, for appellee.

ELLIOTT, J.—The appellee instituted this action to recover the value of a cow injured and a heifer killed by the locomotive and cars of the appellant. The action is founded upon the statute making it the duty of railroad companies to fence their roads, and imposing a liability for animals killed or injured because of the failure to perform this statutory duty.

Our decisions settle some general principles which apply to this case, and which it is proper to declare at the outset constitute the law governing the case.

If animals enter upon the roadway at a place where it was the duty of the railroad company to fence, and are killed or injured, the company is liable if there was no secure fence at that place. *Wabash, etc., R. W. Co. v. Tretta*, 96 Ind. 450; *Lake Erie, etc., R. W. Co. v. Kneadle*, 94 Ind. 454; *Louisville,*

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etc., *R. W. Co. v. Quade*, 91 Ind. 295; *Louisville, etc.*, *R. W. Co. v. Overman*, 88 Ind. 115; *Jeffersonville, etc.*, *R. R. Co. v. Lyon*, 72 Ind. 107; *Toledo, etc.*, *R. W. Co. v. Howell*, 38 Ind. 447.

If the place is one that can not be fenced without interfering with the business of the company in the discharge of its duty to the public, or if the place is one which can not be fenced without interfering with the use of a highway, then there is no obligation to fence resting upon the company. *Indiana, etc.*, *R. W. Co. v. Leak*, 89 Ind. 596; *Indianapolis, etc.*, *R. R. Co. v. Kinney*, 8 Ind. 402; *Lafayette, etc.*, *R. R. Co. v. Shriner*, 6 Ind. 141; *Bellefontaine R. W. Co. v. Suman*, 29 Ind. 40; *Indianapolis, etc.*, *R. R. Co. v. Christy*, 43 Ind. 143.

If the company can not fence at the place where the animals entered without endangering the safety of the persons engaged in the management and running of its locomotives and trains, it is absolved from the statutory duty of fencing. *Lake Erie, etc.*, *R. W. Co. v. Kneadle, supra*; *Evansville, etc.*, *R. R. Co. v. Willis*, 93 Ind. 507.

Where cattle-guards are necessary to prevent animals from entering upon the roadway, and fences can not be built, then it is the duty of the company to construct proper cattle-guards, provided the place is one where, under the rules just stated, it is practicable to do so. *Wabash, etc.*, *R. W. Co. v. Tretts, supra*; *Whitewater R. R. Co. v. Bridgett*, 94 Ind. 216; *Grand Rapids, etc.*, *R. R. Co. v. Jones*, 81 Ind. 523; *Evansville, etc.*, *R. R. Co. v. Barbee*, 74 Ind. 169; *Indianapolis, etc.*, *R. R. Co. v. Irish*, 26 Ind. 268; *Pittsburgh, etc.*, *R. R. Co. v. Ehrhart*, 36 Ind. 118; *Indianapolis, etc.*, *R. R. Co. v. Bonnell*, 42 Ind. 539; *Louisville, etc.*, *R. W. Co. v. Porter*, 97 Ind. 267.

The statute does not, in terms, make any exceptions to the duty to fence, but the courts have recognized the existence of exceptions, casting, however, the burden of showing that the place is one which, under the rules stated, can not be fenced, upon the railroad company claiming an exemption from the general statutory rule. *Wabash, etc.*, *R. W. Co. v. Tretts, su-*

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pra; *Louisville, etc., R. W. Co. v. Clark*, 94 Ind. 111; *Lake Erie, etc., R. W. Co. v. Kneadle*, 94 Ind. 454; *Terre Haute, etc., R. R. Co. v. Penn*, 90 Ind. 284; *Pittsburgh, etc., R. W. Co. v. Laufman*, 78 Ind. 319; *Indianapolis, etc., R. W. Co. v. Thomas*, 84 Ind. 194; *Indianapolis, etc., R. R. Co. v. Lindley*, 75 Ind. 426; *Wabash R. W. Co. v. Forshee*, 77 Ind. 158; *Ohio, etc., R. W. Co. v. Rowland*, 50 Ind. 349.

Where there is evidence upon all the material points fairly tending to support the verdict, it will not be disturbed.

The evidence satisfactorily shows that the animals injured entered upon the railroad at a point where it was not fenced, and were struck by one of the appellant's locomotives, so that the only question in the case is whether the company has shown, by a preponderance of the evidence, that the place was one which it was not its duty to fence.

Near the place where the animals entered upon the track, it obliquely crosses a highway known as the Granville turnpike, and crosses it at very sharp angles, so that, in order to fully pass the lines of the turnpike, a train must traverse a distance of ninety feet. A cattle-guard was constructed across the railroad track at right angles and connected with a fence, but this guard was located sixty feet and four inches north of the north line of the highway, thus leaving a considerable piece of ground "pocket shaped," as the witnesses described it, not protected. The evidence was conflicting as to whether the cattle-guard was or was not placed at a point where it would best keep off cattle, but we can not say that there was not evidence sustaining the finding of the jury upon this question. It is not enough, as our decisions declare, to build fences or construct cattle-guards, but they must also be constructed so as to be reasonably well adapted to keep animals from entering upon the track. It is obvious that where cattle-guards are improperly constructed or unsuitably located, the railroad can not be said to be "securely fenced in," and this is what the statute in express terms requires of railroad companies. R. S. 1881, sec. 4031. It is no doubt true that railroad

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companies are not held to the exercise of extraordinary diligence and care, but they certainly are held to the exercise of ordinary care, prudence and diligence in the location and construction of fences and cattle-guards.

We do not think the evidence shows that to have located the cattle-guard nearer the line of the turnpike would have endangered the safety of its agents or servants, or have interfered, in the sense intended by our decisions, with the transaction of its business. There was no depot, nor was there any switch in the vicinity of the highway, nor any mill or factory from which freight was received, or at which freight was discharged; all that the evidence shows is that there was a highway crossing of a somewhat unusual character. This fact does not authorize the conclusion that the company was not bound to "securely fence in" its track. Something more than this must be shown in order to escape the performance of the statutory duty.

The only plausible ground upon which it can be argued that the company was not bound to place a cattle-guard nearer the line of the highway is, that to have done so would have made the use of the highway unsafe, but this ground falls away when the evidence is examined. We agree with counsel that the company had no right to place fences or guards in such a position as to make the use of the highway dangerous. The exception created by the courts respecting highways is, however, not to advance the private interests of the company, but to protect the public. *Wabash, etc., R. W. Co. v. Tretts, supra*; *Indianapolis, etc., R. W. Co. v. Thomas*, 84 Ind. 194; *Pittsburgh, etc., R. W. Co. v. Laufman*, 78 Ind. 319. Nor does the exception operate to exonerate the company simply because the place is difficult to fence.

In *Indianapolis, etc., R. R. Co. v. Parker*, 29 Ind. 471, it was said: "The exception only extends to places where it is unreasonable or improper that the road should be fenced." Nor is the exception available to the company upon the sole ground that it would be difficult and expensive to "securely

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fence in " the road. *Wabash, etc., R. W. Co. v. Tretts, supra* ; *Indianapolis, etc., R. R. Co. v. Lindley, supra* ; *Pittsburgh, etc., R. W. Co. v. Laufman, supra* ; *Pittsburgh, etc., R. W. Co. v. Thomas, supra* ; *Ohio, etc., R. W. Co. v. Rowland*, 50 Ind. 349.

The appellant's counsel argue that the company was exonerated because it was not practicable to build the cattle-guard at a place different from that selected, but the broad meaning which they assign to the word " practicable " is not one which our cases recognize. It is the duty of the company to construct such guards wherever needed, except in the cases which are recognized as exceptions to the statutory rule.

A railroad company is liable where it places a cattle-guard at the wrong place. *Jeffersonville, etc., R. R. Co. v. Morgan*, 38 Ind. 190. In that case it was said : " We are also of the opinion that it was the duty of the appellant, to protect itself from liability, to have placed a cattle-guard at the north side of the Salem road, and fenced the road on either side north. The cow-gap was placed at the wrong place. It should have been at the intersection. It being one hundred and eighty feet north of the intersection, and connected with field fences on either side of the railroad track, and there being nothing at the intersection to prevent stock from going on the track, it created an excellent trap for stock."

Counsel say that the law does not require that a diagonal cattle-guard should be constructed along the line of the highway, where the railroad crosses it obliquely, and refer us to the case of *Indianapolis, etc., R. R. Co. v. Irish*, 26 Ind. 268. That case, however, does not support the position of counsel, for there it appeared that the cattle-guard could not have been differently placed without seriously interfering with the company in repairing its road. That case goes further than any other case in our reports, but it can not be made to cover the present without further extending its doctrine, and this we are unwilling to do. It is not shown that it would have seriously

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interfered with the work of repairing the road to have placed the guard nearer the line of the highway.

We do not think the question in this case is, whether the company was bound to place a diagonal guard close along the line of the highway; but that the question is, whether the cattle-guard, which crosses the railroad at right angles, was located so as to securely "fence in the track." The jury having passed upon this question, and there being evidence fully sustaining their finding on this point, we can not disturb it. Whether a cattle-guard is properly located or not must, in a great measure, depend upon the facts of the particular case, and where the evidence fairly sustains the verdict, it will not be disturbed.

Judgment affirmed.

Filed Dec. 13, 1884.

No. 11,497.

KOLLE v. CLAUSHEIDE.

JUDGMENT.—*Redemption*.—Where one obtains a decree allowing him to redeem from a mortgage within a given time if a certain event shall transpire, the decree binds him, and he can not avoid its effect by a subsequent suit for that purpose, upon the ground that the contingency did not happen, and hence redemption under the decree became impossible.

From the Vanderburgh Circuit Court.

S. R. Hornbrook and *A. C. Hawkins*, for appellant.

C. Denby, *D. B. Kumler* and *V. Bisch*, for appellee.

BICKNELL, C. C.—The appellant had a mortgage, executed by the appellees Henry A. and Rosina, which embraced five lots in Lamasco, known as lots Nos. 28, 29, 30, 31 and 32, in block No. 68, and other lands.

One Daun had a prior mortgage on said five lots. Daun foreclosed his mortgage without making the appellant a party,

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and under Daun's decree said five lots were sold, and were afterwards conveyed by the purchaser to said Rosina in the year 1875. In 1876 the appellant brought a suit against the said Henry A. and Rosina and others to foreclose his mortgage.

In that suit the court found that said Rosina had a prior lien on said five lots for \$700, and interest at 6 per cent. from September 16th, 1875, and it was decreed that all of the mortgaged property, except said five lots, should be sold to satisfy the sum of \$6,302.89, found due the appellant, and that if such sale should fail to pay that sum, then the appellant should have the right to redeem said five lots within ninety days from the date of said decree, by paying to said Rosina the sum found due to her as aforesaid, and that upon such payment, made within said ninety days, the appellant might cause said five lots to be sold under said decree and the proceeds applied in satisfaction of such unpaid residue of said \$6,302.89, and that after such sales all the right, title and interest of all of said defendants in and to said mortgaged property should be forever barred and foreclosed. This decree was rendered on March 8th, 1876. Nearly six years afterwards, in January, 1882, the appellant filed his complaint against the appellees in the present suit, alleging the facts above stated, and that he caused a copy of said decree to be issued to the sheriff immediately, but that some of the said mortgaged property, to wit, lots numbered 20, 21, 22 and 23, in block 68, in Lamasco, was not sold within said ninety days, and was still unsold, and that, therefore, he could not redeem said five lots, because, by the terms of said decree, redemption could be made only in case of deficiency in the proceeds of the sale of the other property, and that said condition as to redemption "was impossible and wholly repugnant to plaintiff's right to redeem, and wholly void," and that plaintiff's right to redeem and to have said five lots sold to satisfy his said decree had not been impaired; that said Mary Krack claims some interest in said property subordinate to said decree; that plaintiff is, and always has been, ready to pay said Rosina the amount of her

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said claim. This complaint prays for an accounting, and "that the plaintiff's right to redeem said lots and have them sold to pay his said decree may be enforced, and that he may have all proper relief."

The said Rosina Clausheide and Mary Krack filed separate demurrers to said complaint for want of facts sufficient; these demurrers were sustained, and final judgment was rendered thereupon in favor of said Rosina and Mary.

The plaintiff appealed, and the rulings upon said demurrers are the only errors properly assigned.

The third specification of the assignment of errors, to wit, that the judgment should have been in favor of the appellant, is not valid. *Kimball v. Sloss*, 7 Ind. 589; *Finch v. Travelers Ins. Co.*, 87 Ind. 302.

There was no error in sustaining said demurrers. In *Eiceman v. Finch*, 79 Ind. 511, this court said: "There are two rights of redemption; the general equitable right and the statutory right. The former is forever barred by the decree and sale; the latter does not spring into existence until the sale takes place. This statutory right comes into existence with the sale; it continues for one year, and then expires." In the case now before us, the facts stated in the complaint will not authorize a statutory redemption, because the requirements of the statute are not shown to have been complied with. R. S. 1881, section 768; *Eiceman v. Finch*, *supra*. And the facts stated will not authorize the general equitable redemption, because the rule that a party can not collaterally impeach a judgment forbids all inquiry into the validity of the decree rendered in the foreclosure suit to which the appellant was a party.

If the appellant was dissatisfied with his decree, he might have appealed or filed a bill of review. He did neither, and now, after waiting six years, he is seeking to impeach his own decree in a collateral proceeding. This can not be done. *Parker v. Wright*, 62 Ind. 398; *Sauer v. Twining*, 81 Ind.

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366; *Hume v. Little Flat Rock Draining Ass'n*, 72 Ind. 499, and cases there cited.

In the rendition of the foreclosure decree, the Vanderburgh Circuit Court had jurisdiction, both of the subject-matter of the action and of the parties; if error intervened, enough to warrant a reversal upon appeal, such error would have no effect in the present proceeding.

One of the objects of the appellant's foreclosure suit was to determine the rights of himself and Rosina Clausheide as to the five lots in controversy; the court made its determination, and the appellant was apparently satisfied with it.

It is not unusual to authorize redemption within a given time, where the statutory right is not asserted, and ordinarily, in such cases, if the redemption be not made within the time fixed, the right to redeem is lost. *Sherwood v. Hooker*, 1 Barb. Ch. 650; 2 Jones Mort., sections 1106, 1107, 1108. There is nothing stated in the complaint demurred to which ought to exclude this case from the operation of the general rule. It was the part of the appellant to see that his decree was enforced; there was ample time, in the exercise of ordinary diligence, for the sale of the other property. The complaint avers that it was not sold, but states no reason or excuse for the failure to sell. The condition was not impossible when the decree was rendered; if it became impossible afterwards by a failure to sell, the delay, in the absence of any reason therefor, must be regarded as the negligence of the appellant, at least in this contest between him and the appellees. *Vigilantibus et non dormientibus jura subveniunt*.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed Sept. 27, 1884. Petition for a rehearing overruled Jan. 9, 1884.

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No. 11,338.

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SPECIAL FINDING.—Exceptions.—Practice.—Where the court finds the facts specially and states conclusions of law thereon, exceptions to the latter, not taken until after a motion for a new trial has been made and overruled, come too late to present any question.

SAME.—Modification of Judgment.—In such case, a motion to modify the judgment so that it would be inconsistent with the conclusions of law should be overruled.

JUDGMENT.—Assignment.—Principal and Surety.—Notice by Assignment.—*Contemporaneous Agreement to first Exhaust one Defendant.—Lien.—Insolvency.—Execution.—Release.—Pleading.*—To a suit by the assignee upon a joint judgment against S. and M. and others, an answer by M., that in the original suit he appeared and in good faith pleaded a valid defence, stating it, and that in consideration of his withdrawing his defence and making default, which thereupon he did, then plaintiff agreed in writing to first exhaust the property of S., who, as between S. and M. was the principal debtor; that so the judgment was suffered, and an execution was issued with direction by the plaintiff to levy upon S.'s property, of which he had abundance upon which the execution was a lien; that no levy was made, the execution was returned, the lien lost, and S. has since become insolvent, of all which the present plaintiff had knowledge, is good on demurrer, and a reply thereto that S. remained solvent long after the return of the execution is bad.

PRACTICE.—Harmless Error.—Where the special finding of facts shows that a particular paragraph of answer was not true, the Supreme Court will not consider whether a demurrer to it was improperly overruled.

SAME.—Where the facts averred in a paragraph of reply, demurred to, are provable under the general denial, which is also in, the demurrer can be sustained without available error.

From the Elkhart Circuit Court.

J. H. Baker, and J. A. S. Mitchell, for appellant.

R. M. Johnson, H. D. Wilson, J. D. Ferrall, W. J. Davis, E. G. Herr, for appellees.

BLACK, C.—The appellant, Benjamin Smith, as equitable assignee of a judgment rendered on the 16th of December, 1868, in the court below, in favor of James V. O. Schutt against Nicholas Smith, Derrick B. McKean and others, for \$2,277.16, and costs taxed at \$32.40, brought suit thereon, on

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152	137
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the 26th of August, 1881, against the appellees Kit McKean, as administrator of the estate of Derrick B. McKean, deceased, Nicholas Smith and said Schutt, the last named being made a party to answer as to his interest. The defendants, except said administrator, were defaulted. Said administrator answered in five paragraphs. The court overruled demurrers of the appellant to the first, second and amended third paragraphs of answer, and sustained his demurrers to the other paragraphs.

The appellant replied in six paragraphs. The court sustained demurrers to the first three of these. On the trial, the court, upon request, rendered a special finding. The appellant moved for a new trial, and this motion having been overruled, he excepted to the conclusions of law stated by the court. The court rendered judgment, and the appellant made two motions, which were overruled, to modify it.

The appellant has assigned as errors the overruling of his demurrers to the first paragraph and the amended third paragraph of answer, the sustaining of the demurrer of said administrator to the first, second and third paragraphs of the reply, the first and the fourth conclusions of law stated by the court, and the overruling of the appellant's motions to modify the judgment.

The first paragraph of answer stated, in effect, that in 1862 a judgment was rendered in the court of common pleas of said county, for the sum of more than \$4,000, on a note executed to the appellant by said administrator's intestate and Charles Hany, Benjamin F. Kenyon, the defendants Schutt and Nicholas Smith and others not served with process therein; that afterwards said Schutt paid \$2,000 on said judgment; that at the March term, 1868, of the court below, Schutt commenced an action against said intestate and said Hany, Kenyon, Nicholas Smith and one David Thompson, to have said Schutt adjudged a surety on said note, and for contribution, on the ground that he was a joint contractor in said note, and by reason of his said payment; that said de-

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defendants in that action appeared and pleaded to said Schutt's causes of action, in good faith, that he was not a surety on said note, and that he, with said defendants and others, executed it as principals as to each other, but for the use and benefit of a commercial partnership by the name and style of "The Farmers' Union Store, at Elkhart, Indiana," of which said Schutt, said intestate, said Kenyon, Hany, Nicholas Smith, and over fifty others then living in said county, and solvent, were members, giving the names of said other persons; that said partnership had been dissolved, and its assets had been disposed of; that it was indebted \$20,000 more than its assets; that said intestate and said Kenyon, Hany and Thompson had paid more than their full proportion of said indebtedness over and above the amount paid by Schutt, setting out the amounts paid by each of them; that said Nicholas Smith and said other solvent partners had paid no part of said judgment or partnership indebtedness; also, other good and valid defences; and asking that all persons interested be made parties, that the rights of the parties be determined, and that full contribution be made.

It was alleged that said Nicholas Smith did not appear or plead in said action, but made default; that said Schutt requested said Kenyon, Hany and said intestate to withdraw their appearance and pleadings aforesaid in said cause; and said parties made an agreement in writing, as follows:

"STATE OF INDIANA, ELKHART COUNTY, ss.:

"It is hereby agreed by and between J. V. O. Schutt, of the first part, and Benjamin F. Kenyon, Derrick B. McKean, Charles Hany and David Thompson, of the second part, and each of them, that in consideration that the said parties of the second part will and do hereby withdraw their appearance and defence, and allow judgment to be taken in an action now pending in the circuit court of said county and State, the said party of the first part will proceed to collect whatever judgment may be rendered therein from Nicholas Smith, who has never paid his share of said old judgment, or any part thereof,

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one of the defendants in said cause, alone, if the same can be done, and will cause the sheriff to levy and sell his property alone for the collection thereof, and will only resort to the property of any of the other defendants in said cause in case of a failure to collect from the said Smith, and will pay Blake and Johnson the sum of fifty dollars, their fee as attorneys therein for said party of the second part, so soon as so much of said judgment is collected. In witness whereof we have hereunto set our hands and seals this 16th day of December, 1868.

(Signed) J. V. O. SCHUTT.

“Per Wilson & Osborn.

“BENJAMIN F. KENYON.

“DERRICK B. MCKEAN.

“CHARLES HANY.

“DAVID THOMPSON.

“Per Blake & Johnson.”

It was alleged that said intestate, Derrick B. McKean, and said Kenyon and Hany, relying on said agreement and the promises and covenants of said Schutt therein contained, and not otherwise, withdrew their appearance and said pleadings and defence in said cause, and permitted judgment to be taken against them therein by default, which is the judgment sued on herein; that at the date of the rendition thereof, and for ten years thereafter, said Nicholas Smith was the owner and possessed of real estate of the value of \$20,000, and personal property of the value of \$5,000, free and unincumbered, situate in said county, and subject during all of said time to execution, out of which said judgment could have been collected; “that he now is and has been for four years last past wholly insolvent, and has not had during said last named time any property subject to execution;” that on the 6th of January, 1869, said Schutt, pursuant to said agreement, caused an execution to be issued on said judgment by the clerk and placed it the hands of the sheriff, directing him to collect said judgment out of the property of said Nicholas Smith, in writing thereon in these words:

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"Collect this out of property of Nicholas Smith, if enough can be found.

WILSON & OSBORN,

"January 6th, 1869.

Att'ys for Plaintiff."

That said execution became a lien on the personal property aforesaid of said Nicholas Smith; that while it was a lien on said property and in full force, the appellant, with full knowledge of said contract, took the assignment of said judgment as stated in his complaint, for and with the fraudulent purpose of collecting it out of said intestate and said Kenyon and Hany, in violation of said agreement and for the use and benefit of said Nicholas Smith, who furnished the means and paid said Schutt for said assignment, and to prevent the collection thereof out of the property of said Nicholas, who is the appellant's brother; that on the 1st of July, 1869, the appellant, with the knowledge and consent of said Schutt, ordered, directed and caused the sheriff to return said execution without the sale of property, and without the knowledge or consent of said Kenyon, Hany or said intestate, whereby the lien of said execution on said personal property was wholly lost, and said Nicholas Smith was allowed to dispose of it without the consent of said intestate or of said Kenyon or said Hany.

The second paragraph of answer was a plea of payment in full of said judgment before the commencement of this action.

By the amended third paragraph of answer it was alleged that though said judgment was assigned, as alleged in the complaint, and at the time therein alleged, to the appellant by said Schutt, yet the appellant paid nothing of his own means for said assignment; that the defendant Nicholas Smith, the brother of the appellant, furnished, of his own money, property and means, the whole of the consideration which was paid to said Schutt for said assignment; that said assignment was made to the appellant for the fraudulent purpose of enabling him to collect said judgment from said intestate and others for the benefit and use of said Nicholas Smith; that the appellant was not the real owner of said judgment, but

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that said Nicholas Smith was the owner thereof, and purchased it with his own money and means.

The first paragraph of reply was addressed to the first paragraph of answer, and alleged, in substance, that the appellant purchased the judgment mentioned in the complaint of said Schutt on the 9th of March, 1869, and then received from him the written assignment thereof set out in the complaint, and on the same day paid said Schutt for said assignment \$2,-300; that at that time, and for a long time thereafter, the appellant had no notice, knowledge or information of the execution or existence of said written contract, copied in the first paragraph of answer, or of any written contract whatever in relation to said judgment; that appellant purchased said judgment in good faith and for a valuable consideration as aforesaid, and relying on said judgment as being truly, fully and correctly entered of record, and on the faith and in the belief that all the rights of the several parties to said judgment were such as were shown and appeared from the judgment, and not in any respect other or different.

The second paragraph of reply, also addressed to the first paragraph of answer, alleged, in substance, that the execution mentioned in said answer was not returned by the sheriff until the expiration of six months after the date of the issuance thereof; that no levy was made by virtue thereof; that it was a joint execution against all the defendants therein; that said Nicholas Smith, at the time of the return of said execution, and for more than ten years next thereafter, at all times, owned and was possessed of \$5,000 of unencumbered personal property and \$10,000 of unencumbered real estate, all of which said property was situate within said county; and that the defendant administrator was not injured by the return of said execution or the failure to serve it.

No argument being presented concerning the third paragraph of reply, we will not further notice it.

The fifth paragraph of reply was a general denial of the

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answer. There was also a general denial of the amended third paragraph of answer.

It appears by the record that the appellant did not except to the conclusions of law stated by the court in the special finding at the time that decision was made, or cause to be noted at the end of that decision that he excepted; but after the rendition of the special finding, he first moved for a new trial, and after that motion had been overruled, he, in open court, excepted to said conclusions of law.

Counsel for the appellee insist that because of this condition of the record the appellant's assignments that the court erred in its first and fourth conclusions of law are not available. This objection is well taken. *Dickson v. Rose*, 87 Ind. 103.

The court rendered judgment that the plaintiff have and recover of the defendant Nicholas Smith the sum of \$4,223.37, and costs; that execution be issued against him first, and that his property be first exhausted; that said Derrick B. McKean, in his lifetime, was surety only on said debt, and if it be filed as a claim against his estate, it shall only be liable as said surety, and nothing herein shall be held to conclude the estate as to the amount to be recovered therefrom, nor as to whether the estate is discharged from liability by reason of any *lashes* occurring since the beginning of this action.

This judgment was in accordance with the conclusions of law stated. The motions of the appellant to modify the judgment sought only such changes therein as would have made it not in accordance with said conclusions of law. Such a mode of proceeding is unknown to our practice. The statute, R. S. 1881, section 551, requires that in a special finding the court shall first state the facts in writing, and then the conclusions of law upon them, "and judgment shall be entered accordingly." This mode of stating the finding of the court is provided for the express purpose of enabling a party to except to the decision of the court upon the questions of

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law involved in the trial. If a judgment rendered on a special finding should not conform to the conclusions stated, a motion would lie to so modify the judgment as to make it conform to such conclusions; but where the judgment rendered on a special finding is in accordance with the conclusions of law stated, error in such conclusions, rendering erroneous the judgment "entered accordingly," can not be reached by a motion to modify the judgment.

If, as alleged in the first paragraph of answer, the appellant took the assignment of the judgment with full knowledge of the written contract referred to in that answer, he would be bound thereby if his assignor was bound, and to the extent to which his assignor was bound. Whether the appellant would have been affected by said contract if he had taken the assignment without such knowledge, need not be decided.

If, in the action in which the judgment now sued on was rendered, a proper issue of suretyship had been tried and determined in favor of the defendants who executed said contract, the court would have made an order directing the sheriff to levy the execution first upon, and to exhaust, the property of the principal before a levy should be made upon the property of the surety.

It seems to have been the intention of the parties to said contract to bind the plaintiff in said action to proceed in the collection of the judgment as it would have been collected under an adjudication of suretyship, with perhaps an obligation on his part to use diligence.

This contract was not incorporated into the judgment, and it could not have been as against Nicholas Smith, who was not bound or concluded by the contract. He has made no question concerning the contract, or upon the proceedings or judgment in the case at bar. Said intestate and the other defendants, except said Nicholas, in the action brought by Schutt, had in good faith filed sufficient pleadings therein. The withdrawal of their appearance and pleadings, which it

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must be supposed they could have maintained, and their allowing judgment to be taken against them jointly with Nicholas Smith, furnished a sufficient consideration for the promise of Schutt in said agreement. What he undertook he could lawfully perform, and as against him Nicholas Smith could not question such performance. Schutt having, by his agreement, induced the other parties to the contract to forego their defences and permit themselves to be placed in such an irreversible situation, could not, without working a fraud against them, repudiate his engagement to mitigate that situation.

The agreement gave the parties thereto, other than Schutt, the right as against him to be treated as sureties, if not more. It was shown by this answer that after Schutt had caused execution to be issued, and had thereon directed its collection out of the property of said Nicholas, if enough could be found, said execution, which was a lien on more than enough property to satisfy the judgment, was, without levy, returned without the knowledge or consent of said intestate, or Kenyon or Hany, but with the knowledge and consent of Schutt, and by direction of the appellant, and said lien was thereby lost, and said Nicholas thereafter became insolvent. It has been held by this court that the voluntary release of such a lien discharges a surety to the extent that he is thereby injured. *Sterne v. Bank of Vincennes*, 79 Ind. 549; *Sterne v. McKinney*, 79 Ind. 578.

It may be proper to remark that the court, in its special finding, found that said Nicholas was still, and ever since the rendition of said judgment had been, the owner of personal property of the value of \$3,000, subject to execution within said county, and that before the commencement of this action he had executed mortgages on his real estate to its full value, one of them being for \$36,000, to a trustee for the benefit of various creditors, and among them the appellant, to secure said judgment. It was not error to overrule the demurrer to the first paragraph of answer.

In the special finding the court stated, among the facts,

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that "Nicholas Smith did not furnish the money or consideration paid to said Schutt for said judgment, nor any part thereof, and the plaintiff is the real owner of the same."

It thus affirmatively appears that the result reached was not based upon such facts as were alleged in the third paragraph of answer, but was based upon contrary facts, so that whether that paragraph presented a sufficient defence or not, the ruling upon the demurrer did not affect the judgment, and it is unnecessary to determine the question as to the sufficiency of that paragraph.

The allegations of the first paragraph of the reply amounted to a mere partial denial of the first paragraph of answer; and if they constituted a sufficient reply, they were provable under the general denial pleaded.

In the second paragraph of reply, while it is alleged that the execution was not returned until the expiration of six months after it was issued, it is not denied that the appellant had received the assignment with full knowledge of said written agreement, and that he, with knowledge of the lien of the execution upon property sufficient to satisfy the judgment, caused the return of the execution without a levy. If he thus relinquished the lien on said property, the allegation that said Nicholas Smith, now insolvent, continued for a number of years to own property out of which the appellant might have obtained satisfaction of the judgment, did not show that the surrender of said lien was not injurious to the other defendants in said judgment. It was not necessary that there should be a levy and a relinquishment thereof to constitute an unjustifiable injury to said other defendants. Whether, if no affirmative action to enforce the judgment had been taken, and while Schutt and the appellant were passive said Nicholas had become insolvent, said other defendants would, under said contract, be released, we need not decide. When, by the issuing of execution, a lien on property had been obtained, and it was relinquished, the fact that said Nicholas still, for a time, had abundant property, did not give the appellant, who

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controlled the judgment the right to claim that his said relinquishment was not injurious to said other defendants. We find no error available to the appellant.

PER CURIAM.—Upon the foregoing opinion, the judgment is affirmed, at the costs of the appellant.

Filed Dec. 19, 1884.

No. 12,008.

SWIGART v. THE STATE.

INTOXICATING LIQUOR.—*Selling to Minor.—Excuse.—Burden of Proof.—Instructions.*—One who sells liquor to an infant has the burden of showing an excuse therefor; and an instruction that if the appearance of the infant indicated that he was of full age, and he had so stated to the accused, the latter is excusable, is not correct.

From the Henry Circuit Court.

— *Brown and R. Warner*, for appellant.

F. T. Hord, Attorney General, *G. W. Duncan*, Prosecuting Attorney, and *W. B. Hord*, for the State.

HAMMOND, J.—Conviction for selling intoxicating liquor to a minor. Questions growing out of overruling appellant's motion for a new trial are the only ones discussed in his brief. The sale to and the minority of the prosecuting witness are not disputed. The evidence fairly showed that such witness, at the time of the sale, was lacking only a few days of being twenty years of age. It is claimed, however, that appellant made the sale in the *bona fide* belief that the purchaser had attained his majority. There was conflict in the evidence as to whether his appearance indicated that he was of full age. Perhaps it would be stating it as strongly in appellant's favor, as the evidence justified, to say that from the appearance of the prosecuting witness one was left in doubt with respect to his minority. In such case it can not be said as a matter of law that the sale was excusable. Indeed, it is more reasonable to hold that the doubt was sufficient to put the seller upon

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his guard, and that, in making the sale, he voluntarily assumed the risk of prosecution and conviction.

There was evidence tending to show that the prosecuting witness had, prior to the sale in question, in response to inquiries as to his age, informed appellant and other saloon keepers that he was over twenty-one years of age. These representations were testified to as having been made when he called for liquor, and to enable him to purchase it. The witness denied having made these statements.

We could not, under a well settled rule of practice, disturb the judgment upon a question of veracity between witnesses, even if the question of appellant's guilt or innocence wholly depended upon the correct decision of such question of veracity. Had the jury found that the prosecuting witness did misrepresent his age, as testified to, it would not legally follow that appellant should have been acquitted. There might be circumstances that would excuse a sale of intoxicating liquor to a minor on his statement that he was over twenty-one years of age. Other circumstances, again, might not excuse such sale. Where the minor's appearance is suggestive of doubt as to his infancy, a sale to him upon his own statement that he is of full age might or might not, according to the peculiar surroundings of each case, satisfy a jury that the sale was in good faith under the honest and reasonable belief of the seller that the purchaser was an adult. But if, in such case, there was a conviction, this court would not undertake to say that it was erroneous.

Complaint is made of instructions given, and of the refusal to give others. No specific objection is pointed out to those given, and we do not discover any fault in them. The appellant tendered three instructions. The first was given; the third was covered by one given by the court on its own motion; and the second was bad. This instruction would have informed the jury, in effect, that the sale was excusable if the appearance of the prosecuting witness indicated that he was of age, and if he had previously represented to the appellant

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that his age was over twenty-one years. Aside from such appearance and representations, supposing there was evidence tending to prove both, there may have been other circumstances in the case from which the jury would infer that the sale was not made in good faith. The instruction omitted altogether the main question for the jury to determine, namely, whether the sale was made under a belief, honestly and reasonably entertained by the appellant, that the prosecuting witness was an adult. Whether such belief was honestly entertained by the appellant, and whether, under the evidence, he had reasonable ground therefor, were questions of fact exclusively for the jury. It would have been error for the court to tell the jury that the proof of certain facts was sufficient to authorize an inference of good faith in the sale. This was for the jury to determine from all the evidence bearing upon the question. The burden was upon the appellant to show that he made the sale in the belief, reasonably as well as honestly entertained, that the purchaser was of full age. We can not say from the evidence, as it comes to us in the record, that the proof introduced by him on this point was sufficient to raise a reasonable doubt of his guilt.

There was no error in overruling the motion for a new trial.

Affirmed, with costs.

Filed Dec. 17, 1884.

 No. 11,419.

SMITH ET AL. v. CLIFFORD.

DRAINAGE.—*Complaint to Recover Assessment.—Exhibit.—County Commissioners.—Jurisdiction.—Collateral Attack.*—A complaint to recover an assessment for drainage, where the proceedings for drainage were before the county board, is not founded upon the order of the board, but upon the assessment; the order establishing the drain need not be made part of the complaint, and if it appear that by petition and proper notice the board had jurisdiction, the order can not be attacked collaterally.

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SAME.—Judicial Knowledge.—County Boundaries.—Courts will take judicial knowledge of the county in which a public ditch is located, and also the lands affected thereby, if the *termini* and route of the ditch, and the section, township and range of the lands, be shown by averment.

From the Hamilton Circuit Court.

F. M. Trissal, for appellants.

L. O. Clifford, *T. J. Kane* and *T. P. Davis*, for appellee.

FRANKLIN, C.—Appellee brought this suit against appellants to collect a ditch assessment. This case has heretofore been before this court, and is reported in 83 Ind. 520. The judgment was then reversed, for the reason that no copy of the assessment was made a part of the complaint.

The complaint in the case under consideration appears to have been amended and filed February 6th, 1883, after the reversal of the former judgment, and is based upon a copy of the assessment. There was a demurrer overruled to the complaint, and the only assignment of error is based upon that ruling.

The first objection urged against the complaint is, that it does not show that the county board adjudged that the contemplated work was of public utility. This action is not founded upon the judgment establishing the work, but upon the assessment made by the appraisers. It was not necessary that such judgment should be a part of the complaint. The transcript of the proceedings before the county board, filed as an exhibit with the complaint, shows the filing of the petition, the giving of proper notice, the appointment of the appraisers, and their assessment of the damages and benefits. Sufficient is shown to give the county board jurisdiction of the case, and in such cases all irregularities before the county board are waived by not appealing from their judgment, and their proceedings are conclusively presumed to be correct, and can not be attacked in this collateral way. *Cauldwell v. Curry*, 93 Ind. 363; *Town of Cicero v. Williamson*, 91 Ind. 541; *Foster v. Paxton*, 90 Ind. 122; *Featherston v. Small*, 77 Ind. 143; *Marshall v. Gill*, 77 Ind. 402.

Smith *et al.* v. Clifford.

It is further objected that the complaint does not show in what county or State the proposed ditch or the lands to be affected by its construction are situate. The *termini* of the ditch, and the section, township and range of the lands to be affected thereby, are definitely stated.

The notice of the pendency of the petition states that the lands to be affected by the ditch, describing them, were situate in Jackson township, Hamilton county, Indiana. The county board took jurisdiction of the case. This court will take notice of the boundary lines of Hamilton county; and where the section, town. and range of the ditch, and the lands to be affected, are stated, with the averments in said notice, we think the proceedings sufficiently show that said ditch and lands were situate in Hamilton county, Indiana. *Dutch v. Boyd*, 81 Ind. 146.

It is further objected that the complaint does not show that appellants owned, or had any interest, in the lands upon which the assessment was made. In this we think appellants are mistaken. The assessments of benefits made by the appraisers positively state that the lands assessed belonged to appellants.

It is further insisted that the complaint should show that the owner of the land had notice of the meeting of the appraisers to make the assessment. The complaint does aver that such notice was given, by reading and leaving a copy more than ten days before the meeting of such appraisers.

None of the objections urged against this complaint are well taken. See the case of *Bate v. Sheets*, 50 Ind. 329.

We find no error in this record. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed Dec. 19, 1884.

Giles v. Canary.

No. 11,950.

GILES v. CANARY.

PRACTICE.—*Defect of Parties.*—*Waiver.*—That there is a defect of parties defendants is waived if objection be not made by demurrer.

SAME.—*Evidence.*—*Weight.*—*Credibility.*—*Supreme Court.*—The Supreme Court will not weigh conflicting evidence, nor determine as to the credibility of witnesses.

JUDGMENT.—*Promissory Note.*—*Joint and Several Contract.*—*Merger.*—A judgment against one of several makers of a joint and several note does not merge the note or work the release of the other makers.

From the Sullivan Circuit Court.

J. C. Briggs and *C. E. Barrett*, for appellant.

W. S. Maple and *S. Coulson*, for appellee.

ELLIOTT, J.—The appellant, without having demurred to the complaint below, now insists, under a specification in the assignment of errors, that the pleading is bad because it shows on its face a non-joinder of necessary parties defendants. The objection is not available under the attack here made upon the complaint.

The only question presented by the record is whether the verdict is sustained by the evidence. The appellant claimed that he was the surety on the note sued on, and that this fact was known to the appellant, and he further claimed that the time of payment was extended without his consent, and that interest was received from the principal in advance. It was established that the appellant was surety, and that the appellee had knowledge of the fact, but there was a direct conflict of evidence upon the question whether the time of payment was extended. It is the settled rule that where the court below gives credit to witnesses testifying to a state of facts, and accepts their testimony as correct, this court will also act upon the state of facts taken as correct by the trial court. *Arnold v. Wilt*, 86 Ind. 367; *Cain v. Goda*, 94 Ind. 555; *Julian v. Western Union Tel. Co.*, 98 Ind. 327. We can not, therefore, disturb the finding of the court upon this point.

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The appellant read in evidence a judgment rendered in this action against John Wagner, one of the makers of the note, which was rendered upon default sometime prior to the filing of the supplemental answer pleading a discharge by reason of the merger of the note in that judgment. The note sued on reads: "I promise to pay to the order of Christian Canary three hundred dollars," and is a joint and several note, and not a joint obligation. *Lambert v. Lagow*, 1 Blackf. 388; *Groves v. Stephenson*, 5 Blackf. 584; *Maiden v. Webster*, 30 Ind. 317. The rule that a judgment upon a joint obligation merges the cause of action, and works a release of a joint obligor against whom no judgment is taken, does not apply to a joint and several note. Judgment affirmed.

Filed Dec. 18, 1884.

No. 7846.

CITY OF LOGANSPORT v. LAROSE ET AL.

CITY.—Annexation Proceedings.—Taxes.—Injunction.—Complaint.—Written Instrument.—Foundation of Action.—Exhibit.—In a suit by certain owners of real estate to enjoin the collection of certain municipal taxes, upon the ground that their real estate had not been lawfully annexed to the municipality, the annexation proceedings are not a written instrument within the meaning of section 78 of the civil code of 1852 (section 362, R. S. 1881), and are not the foundation of the suit; and, therefore, the copy of such proceedings, filed as an exhibit, does not become a part of the pleading, and can not be considered, in determining its sufficiency on demurrer.

SAME.—Annexation of Unplatted Land.—Jurisdiction of Common Council.—In the annexation of contiguous territory, under the provisions of section 3195, R. S. 1881, the common council of an incorporated city is not authorized to extend the boundary of such city, by resolution, so as to include adjoining lands which have not been laid off in lots and platted, and a record made of such plat; and any such attempted annexation of unplatted lands is void for want of jurisdiction, and the levy and attempted collection of municipal taxes, on such lands so annexed, may be enjoined by the decree of the proper court.

SAME.—Annexation of Contiguous Territory.—Petition of Common Council.—Board of County Commissioners.—Errors in Proceedings.—Remedy by Appeal.

99	117
131	96
133	102
99	117
136	537
99	117
142	508
99	117
147	135
99	116
151	181
99	117
158	91
99	117
159	71
99	117
168	255
99	117
171	316

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—Under the provisions of sections 3196 and 3197, R. S. 1881, an incorporated city may procure the annexation of contiguous territory, whether platted into lots or otherwise, without the consent of the owner or owners thereof, upon the petition of its common council to the board of commissioners of the county wherein such city is situate, and the order of such board granting the prayer of such petition; and, if there be errors in such proceedings, the remedy of the party aggrieved thereby is an appeal to the circuit court of the county, and not a suit for an injunction.

SAME.—Acquiescence.—Equitable Defence.—Laches and Neglect.—Equity.—Where the annexation proceedings are of doubtful legality, or even clearly illegal, if the residents and property owners of the annexed territory are guilty of *laches* and neglect in asserting their legal rights, and acquiesce for a number of years in the validity of such annexation, during which time they voted for city officers, and were represented in the common council of the city by councilmen of their own selection, and by their action and the votes of their representatives large debts were contracted by the city for its improvement, in all the benefits of which they shared, such long-continued acquiescence in such annexation constitutes a complete equitable defence in bar of this suit to enjoin the collection of the city taxes, assessed against the property so annexed, in a court of equity.

PLEADING.—Complaint.—Statement of Facts.—Legal Conclusions.—It is error to overrule a demurrer to a paragraph of complaint, which, instead of a statement of facts, contains merely legal conclusions from facts, which are not alleged and are not apparent.

PRACTICE.—Reversal of Judgment.—Supreme Court.—Where the judgment below rests upon a complaint of two or more paragraphs, to one of which the trial court has erroneously overruled a demurrer for the want of sufficient facts, and the record does not affirmatively show that such judgment rests exclusively upon the good paragraph or paragraphs, it will be reversed by the Supreme Court.

From the Cass Circuit Court.

M. Winfield, D. Turpie and J. C. Nelson, for appellant.

D. P. Baldwin and D. D. Dykeman, for appellees.

Howk, J.—This action was commenced for the April term, 1877, of the court below, by John S. LaRose, Paul Taber and Anthony Grusenmeyer, who sued for themselves and all others interested, as plaintiffs, against the City of Logansport and Joseph B. Messenger, treasurer of such city, as defendants. Such proceedings were had therein as that at

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the April term, 1878, of the court, the appellees filed an amended complaint in three paragraphs. In each of these paragraphs the appellees sought to enjoin the city of Logansport and the city treasurer from the collection of certain taxes, which, as they alleged, the officers of such city had illegally assessed and charged against them and their property, for the reason that their property was not lawfully within the corporate limits of such city, and, therefore, was not lawfully liable to taxation by or for such city.

The cause was put at issue and tried by the court, and a finding was made for the appellees, that they were entitled to the relief demanded in their complaint; and over the appellant's motions for a new trial and in arrest, the court rendered a judgment and decree in accordance with its finding.

The first error of which complaint is made by the appellant in this court is the overruling of its separate demurrers to each of the paragraphs of appellees' complaint. We will separately consider and pass upon the sufficiency of each of these paragraphs in their enumerated order.

1. In the first paragraph of the complaint it was alleged that each of the appellees was the owner of a certain described lot or lots in the original plat of Taberville, as recorded in the recorder's office of Cass county; that, on the fifth day of May, 1870, the appellant attempted to annex the town of Taberville to such city of Logansport by resolution and proceedings, a copy of which, marked "Exhibit A," was filed with and made a part of such paragraph; that the appellees were not parties to said proceedings, nor had they any opportunity of being heard with reference thereto, and they averred that such proceedings were illegal and void for the following reasons, to wit:

The town of Taberville, on May 5th, 1870, was not contiguous to, nor did it adjoin, the city of Logansport, but, on the contrary, there intervened between said town and city a wide and navigable river, to wit, the Wabash river, the bed of which belonged to the United States, upon the north bank

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whereof was situate the city of Logansport, and upon its south bank, and between the river and the town of Taberville, was a strip of ground 200 feet wide, which was never platted or laid out into lots, and was not, on May 5th, 1870, annexed to or a part of such city of Logansport, and, therefore, the common council of such city had no authority whatever by law to make said annexation, and such attempted proceedings were wholly void; that the town of Taberville, Wm. H. Stanley's addition to Logansport, and H. A. Bartlett's addition to Logansport, which were all the platted lots, south of the Wabash river, attempted to be annexed to the city by said resolution, did not adjoin the city of Logansport; that the annexation was void, because it attempted to annex at the same time and by the same act, with the said plats of town lots, 800 acres of farming lands, which were never theretofore platted.

And the appellees averred that their said lots, so attempted to be annexed, were worth \$2,500; that the appellant annually assessed against the said lots a large amount of taxes, to wit, \$50, which the appellees were compelled to pay; that there was then assessed against said lots the sum of \$50, as the taxes for the year 1876; that the tax duplicate was then in the hands of appellant's treasurer, who was threatening to collect such taxes of appellees' goods, and chattels; that the said assessment was illegal and void, because such annexation was void, and the appellees were not liable to pay taxes to the city of Logansport; that by reason of the so-called annexation, and of the annual levy of taxes against the appellees' property by the appellant, their said lots were greatly diminished in value, and such taxes were a cloud upon their title, and the said annexation proceedings were an irreparable injury to them and their title. It was also alleged that the treasurer of the city of Logansport was about to levy upon the appellees' property for the collection of such taxes, and would do so, unless restrained, before this cause could be finally heard. Wherefore, etc.

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The first objection urged by the appellant's counsel to this first paragraph of complaint is, that the annexation proceedings, which are alleged to have been illegal and void, are not set out at length, nor stated in substance, in such paragraph. In other words, counsel claim that the annexation proceedings, described in the first paragraph, are not the foundation of the cause of action therein stated; and that for this reason the copy of such proceedings, filed with the paragraph as an exhibit, did not thereby become a part of the paragraph, and can not be considered in determining the sufficiency of the facts therein stated to constitute a cause of action. In this latter view of the matter, as a question of pleading under section 78 of the civil code of 1852, in force at the time (section 362, R. S. 1881), the appellant's counsel would seem to be right. *Wilson v. Vance*, 55 Ind. 584; *Schori v. Stephens*, 62 Ind. 441; *Ryan v. Curran*, 64 Ind. 345 (31 Am. R. 123). It seems to us, however, that the decision of this point in the appellant's favor is, by no means, conclusive of the question of the alleged insufficiency of the first paragraph of the complaint. The facts alleged by the appellees in the first paragraph of their complaint, without any reference to the exhibit therewith filed, are sufficient to show that the action of the appellant's common council, in extending the limits of the city of Logansport, by resolution, over the town of Taberville and adjacent territory, was not authorized by law, and was therefore void.

In the general law for the incorporation of cities, approved March 14th, 1867, under which we assume, the contrary not appearing, that the city of Logansport was incorporated at the time of such attempted extension of its corporate limits, three modes are prescribed for the government of such cities in the extension of their boundaries, so as to include therein contiguous territory. Thus, in section 84 of such general law (section 3195, R. S. 1881), it is provided that "Whenever there shall be or may have been lots laid off and platted adjoining such city, and a record of the same is made in the recorder's

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office of the proper county, the common council may, by a resolution of the board, extend the boundary of such city so as to include such lots; and the lots thus annexed shall thereafter form a part of such city and be within the jurisdiction of the same." In the case thus provided for the action of the common council is alone sufficient to extend the city boundaries.

In the first sentence of section 85 of such general law (section 3196, R. S. 1881), provision is made for the extension of the city limits over contiguous territory, whether the same be platted into lots or not, by the action of the common council, with the written consent of the owner or owners of such territory. Under the residue of the same section and the first sentence of section 86 of the said general law (section 3197, R. S. 1881), provision is made for the annexation to the city of contiguous territory, whether platted into lots or otherwise, without the consent of the owner or owners thereof, upon the petition of the common council to the board of commissioners of the county, in which the city is situate, and the order of such board granting the prayer of such petition. 1 R. S. 1876, pp. 310 and 311.

It would seem from the allegations of the first paragraph of the complaint in the case at bar, that in the annexation of the plat or town of Taberville, and the other territory mentioned, the appellant and its common council had not conformed to, nor complied with, either of the modes prescribed by the statute for the annexation of contiguous territory to the city limits. We are of the opinion that the facts stated by the appellees in the first paragraph of their complaint were sufficient to show that the action of appellant's common council in the annexation of the plat or town of Taberville, and the other territory mentioned, to the limits of Logansport, was not authorized by any statutory provision, and was, therefore, void. It was alleged by the appellees, as we have seen, in such first paragraph, that the town of Taberville and the other territory mentioned, at the time appellant's common council

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attempted to annex the same to the city of Logansport, were not contiguous nor adjoining to the limits of such city, but were separated therefrom by the bed of the Wabash river, belonging to the United States, and by a strip of ground two hundred feet in width, which had never been platted or laid off into lots. Appellant's counsel claim, however, that the first paragraph of the complaint was bad, on the demurrer thereto for the want of facts, because it did not expressly allege that the boundaries of Logansport were so extended over the town of Taberville and the other territory mentioned, without the consent of the owners thereof in writing. This point is not well taken. The appellees sued as the owners of lots in the plat or town of Taberville, and they alleged in the first paragraph of their complaint that they were not parties to the proceedings for the annexation of said town to the city of Logansport, and had no opportunity to be heard in relation thereto, and that such proceedings were illegal and void. From these allegations it sufficiently appears, we think, that the appellants' proceedings for the annexation of the town of Taberville, and the other territory mentioned, were not had with the consent, written or otherwise, of the appellees, as the owners of lots in such town.

We conclude, therefore, that the facts stated in the first paragraph of the complaint, without reference to the exhibit therewith filed, were sufficient to constitute a cause of action in favor of the appellees, and that the demurrer thereto was correctly overruled.

In the second paragraph of their complaint, the appellees alleged that they severally owned separate parcels of real estate lying south of the Wabash river, particularly describing the lots owned by each of them; that on the 20th day of June, 1870, the board of commissioners of Cass county attempted by certain proceedings (a copy of which was filed with and made part of such paragraph, had upon a "so-called petition," a copy of which and of the notice thereon, and of D. H. Chase's demurrer, was also filed therewith and made a

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part thereof), to annex such lands and lots to the city of Logansport and make them a part of such city. And the appellees averred that such proceedings were irregular and void, in this, to wit :

1. The territory so attempted to be annexed was not contiguous territory to the city of Logansport ;

2. The common council of Logansport, that adopted the alleged application, had not the power to make the same, the resolution having been made at an adjourned session, and not introduced at a regular meeting ;

3. The common council never signed the petition to the county board, nor did any of the members thereof ;

4. The petition was never signed by the city, nor was its seal ever attached thereto ;

5. The common council never filed any petition before the county board ;

6. The order was made upon a copy of the petition passed by the common council ;

7. No plat of the territory to be annexed was ever filed with the county board ;

8. The notice given of the filing and hearing of the petition by the county board was not legally published ;

9. The so-called petition was a conditional petition, and the order was made thereon, as was apparent on its face ; and the conditions were not competent for the city to include in such petition, or for the county board to make a part of its annexation order, to wit, the attempted annexation was coupled with the condition that the county should build the bridges over the Wabash river, and the city should keep them in repair, which condition the county board had no power to make ;

10. The proceedings had never been recorded in the recorder's office of Cass county ;

11. Between the territory so attempted to be annexed and such city of Logansport was the Wabash river, a navigable stream 200 feet wide, the bed of which belonged to the United States government, and in said river, between such

territory and city, was a large island called "Biddle's Island Home," containing 100 acres of land, which had not been platted.

The appellees averred that their said parcels of real estate were worth the sum of \$2,500, and that since said annexation the appellant had annually assessed thereon the sum of \$50 taxes, which the appellees were compelled to pay; that said assessment was illegal because the annexation proceedings were illegal and void; that there were then assessed against their said lands, for 1876, taxes in the sum of \$50, to collect which the appellant had placed in the hands of its treasurer its tax duplicate, and the said treasurer was about to collect the said taxes out of appellees' property, and would do so if not restrained therefrom by an order of the court; that said pretended annexation, and appellant's annual assessment of taxes, and the annual attempts to encumber appellees' lands with said taxes, greatly diminished the same in value, and were a cloud upon their titles thereto, and worked an injury which could not be compensated in damages, but was lasting and irreparable; that there were a large number of other persons owning territory who were affected in like manner with the appellees, and who, by reason of their number, amounting to 1,000 persons or more, could not be conveniently joined in this suit; and that therefore the appellees prosecuted this action on behalf of themselves and of such other persons. Wherefore, etc.

In discussing the sufficiency of this second paragraph of the complaint, appellant's counsel make the same objection thereto that they made to the first paragraph; that is, they claim that the petition of appellant's common council to the board of commissioners of Cass county, the notice of such petition, and the action and order of the county board thereon, were not, nor was either of them, written instruments within the meaning of section 78 of the civil code of 1852 (section 362, R. S. 1881), upon which the second paragraph is founded; and therefore they insist that the copies of such petition, notice

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and order, which were filed with such second paragraph as exhibits, did not become parts of the record, and can not be considered in determining the question of the sufficiency of such paragraph. This objection to the second paragraph of complaint is well taken. The record of the county board, in proceedings had before it for the annexation of contiguous territory to an incorporated city, is not a written instrument within the meaning of the code, and, therefore, the filing of a copy or transcript of such record with any pleading does not make it a part of such pleading. This is settled by many decisions of this court. *Lytle v. Lytle*, 37 Ind. 281; *Brooks v. Harris*, 41 Ind. 390; *Wilson v. Vance*, 55 Ind. 584; *Morrison v. Fishel*, 64 Ind. 177; *Hopper v. Lucas*, 86 Ind. 43.

The appellees' attorneys have directed our attention to the case of *City of Peru v. Bearss*, 55 Ind. 576, which, they claim, recognizes a different rule of pleading from the one relied upon by appellant's counsel in making the objection now under consideration to the second paragraph of the complaint. In the preparation of such second paragraph the complaint in the case cited was, perhaps, used as a precedent. In that case the petition of the common council of the city of Peru, and the action of the county board thereon, by copies thereof as an exhibit, were filed with and made part of the complaint; and it would seem, from the opinion of the court, that the exhibit so filed was referred to, and considered, as a part of the complaint. It is manifest, however, from that opinion, that the point we are now considering was neither made nor decided in the case cited; and doubtless many other cases might be cited in which such exhibits have been considered by this court as parts of the records before us, simply because the parties on both sides have, without objection, so considered and treated them. *Wilson v. Board, etc.*, 68 Ind. 507; *Board, etc., v. Hall*, 70 Ind. 469. But such cases can hardly be regarded as authorities upon the question of pleading now under consideration; and certainly we know of no recent case in this court, where the objections have been made, in which

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it has been held that such exhibits as those filed with the second paragraph of the complaint, in the case now before us, thereby became parts of the record, and could be considered as such in determining the sufficiency of the pleading where-with they were filed.

The objection thus urged by appellant's counsel is manifestly fatal to the sufficiency of the second paragraph of appellees' complaint. For, in the absence from the record of the petition of the common council of the city of Logansport, for the annexation of the territory referred to, the notice given of such petition, and the proceedings had thereon by and before the board of commissioners of Cass county, it is impossible for us to determine whether or not the many objections, assigned by the appellees to the validity of such proceedings, were well taken and ought to have been sustained. But the second paragraph of the complaint is clearly bad on demurrer, we think, for another and perhaps stronger reason. The annexation proceedings, of which the appellees complain in this paragraph of complaint, were the proceedings of a court of competent jurisdiction, as well of the subject-matter as of the parties. Many errors in these proceedings are complained of by the appellees, in the second paragraph of their complaint, some of which would, perhaps, have been fatal to such proceedings, if an appeal therefrom had been taken to the circuit court of the county, within the time required by law. The annexation proceedings were not shown by any of the averments of the second paragraph of complaint to have been wholly void. There may have been errors in such proceedings, but the remedy of the appellees for such errors was an appeal therefrom to the circuit court. The proceedings of the county board can not be collaterally impeached or attacked, on account of such errors, as the appellees have attempted to do in the second paragraph of their complaint. This is settled in many of the recent decisions of this court. *Grusenmeyer v. City of Logansport*, 76 Ind. 549; *Board, etc.*,

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v. *Karp*, 90 Ind. 236; *Town of Cicero v. Williamson*, 91 Ind. 541; *Rutherford v. Davis*, 95 Ind. 245.

We conclude, therefore, that the trial court clearly erred in overruling appellant's demurrer to the second paragraph of appellees' complaint.

In the third paragraph of their complaint, the appellees alleged their respective ownership of the same lots and lands described in the second paragraph; that, on the 20th day of June, 1870, the board of commissioners of Cass county attempted to annex such lands and lots to the city of Logansport by certain proceedings, copies of which were therewith filed as exhibits, one of which was a copy of the so-called petition filed by such city before the said board of commissioners; and the appellees averred that the said proceedings and order were void, because the said petition was never signed as by law required, and that the board of commissioners, by reason of there having been no legal petition before it, never acquired any jurisdiction to act in the premises.

The court clearly erred, we think, in overruling appellant's demurrer to this third paragraph of the complaint. Even if the exhibits therewith filed could be taken as parts of the record and referred to, in aid of the pleading, the paragraph would still be bad on demurrer for the want of facts, as a cause of action. The allegations that the petition, filed by the city before the county board, was never signed as the law required, and that the county board, for the want of a legal petition, never acquired any jurisdiction to act in the premises, were not allegations of facts; but they were the pleader's conclusions from facts which were not alleged and were not apparent. The demurrer to the third paragraph of the complaint ought to have been sustained.

As we have reached the conclusion that the trial court erred in overruling appellant's demurrer to the second and third paragraphs of appellees' complaint, the judgment below must be reversed. For the record shows affirmatively that the finding and judgment of the court, in this case, rest as

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well upon the bad paragraphs as upon the good paragraphs of appellees' complaint. In such a case, it is well settled by the decisions of this court, that a judgment in favor of the plaintiff can not be sustained, and must be reversed. *Schafer v. State*, 49 Ind. 460; *Evansville, etc., Co. v. Wildman*, 63 Ind. 370; *Pennsylvania Co. v. Holderman*, 69 Ind. 18; *Ethel v. Batchelder*, 90 Ind. 520.

The conclusions we have reached, in regard to the insufficiency of the second and third paragraphs of appellees' complaint, and the necessary reversal of the judgment consequent thereon, practically dispose of this appeal. But, in view of further possible litigation in the case, it is due to the parties, we think, that, before closing this opinion, we should consider and decide the question of the sufficiency of the second paragraph of appellant's answer. To this paragraph of answer the court sustained the appellees' demurrer, and this ruling appellant has assigned here as error.

In the second paragraph of its answer, the appellant admitted that, on the 5th day of May, 1870, by a resolution of its common council, it directed the annexation of the territory to the city of Logansport; that such proceedings were thereafter had before the board of commissioners of Cass county, that the territory was declared and adjudged to form a part of the territorial limits of the city of Logansport; that the said proceedings had been duly recorded in the recorder's office of Cass county; that the appellees, and those for whom they prosecuted this action, were then and since residents of the territory so annexed; that, though duly notified of the pendency of such proceedings before the board of commissioners, as required by law in such cases, they did not appear before the board to contest such annexation, or make objections thereto, but made default; that all of the proceedings were made a part of the public records of such city and county board, and were at all times accessible to the appellees and to those for whom they prosecuted this suit, and the con-

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tents thereof were fully known to them at the time, and if the legal effect of the proceedings and their non-conformity with the law were not known to them, their ignorance was of the law and not of the facts; that the appellees, and those for whom they sued, immediately thereafter acquiesced in such annexation; that the common council included the territory in the third ward of such city; that the appellees and those for whom they sued became, in fact, citizens of Logansport, held city elections, voted for city officers, and elected two councilman from that ward to represent them in the common council; that these councilmen qualified and acted as such in all the deliberations of the council, voting on all ordinances and resolutions brought before the council, and at the election of such city officers as were by law elected by the council; that annually, after such annexation, during the past eight years, they had held city elections and voted for city officers, and had been represented by two councilmen in the city council; that the territory had been included in the school city of Logansport, and the appellees and other citizens had availed themselves of the benefits of the school system of such city, and had sent their children to its public schools; that with their knowledge and consent, and relying upon such acquiescence, the appellant had invested \$25,000 in public school buildings within such territory, and issued its bonds therefor, which were still outstanding and unpaid; that since that time the appellant had expended \$15,000 in opening and improving streets within such territory, and had paid the damages assessed to citizens through whose lands streets had been opened; that since such annexation appellant had established a system of water-works for fire protection, at a cost of \$200,000, for which and for the issue of city bonds therefor, the councilmen elected from such territory had voted, and such bonds were still outstanding and unpaid; that, on the petition of a majority of the freeholders of the city, including such territory, a donation of \$100,000 was

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made by appellant to aid in the construction of the Logansport, etc., Railway into such city, for which the bonds of the city had been issued, and were outstanding and unpaid; that other debts to the amount of \$200,000 had been created since such annexation, upon the faith thereof, by the votes of the councilmen from such territory, and were still unpaid; that, at a cost of \$5,000, and at the appellees' request, and by the votes of their representatives in the common council, a fire alarm had been constructed throughout the city, including such territory; and that water-mains and gaslights, at an expense of \$300,000 had been extended over that part of the city; that, during all said time, the appellees had paid their city taxes without objection, and all the aforesaid expenditures had been made, with the knowledge and without the objection of the appellees and the other citizens of such territory, and without any claim or pretence on their part that the annexation was illegal. And the appellant, neither admitting nor denying the irregularities and defects alleged in the complaint, averred that the appellees and those for whom they sued, were estopped from denying the legality of such annexation. Wherefore, etc.

This paragraph of answer can hardly be regarded as a good plea of an estoppel. It lacks several of the essential elements or requisites of a good plea of estoppel. It proceeds upon the theory that the annexation proceedings were matters of public record, of which the appellees and those interested with them were bound to take notice; but if this be true, and perhaps it is, it would seem to be equally true that the appellant and its officers were alike affected with notice of such proceedings. In *Fletcher v. Holmes*, 25 Ind. 458, it was held by this court that the doctrine of estoppel *in pais* "can have no application where everything was equally known to both parties," and so this court has uniformly held. But we need not pursue this view of the second paragraph of answer, for the appellant's counsel do not claim, at least in this court, that

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the paragraph is good as a plea of estoppel. Counsel insist, however, with much force and earnestness, that the facts stated in the second paragraph of answer, admitted to be true by appellees' demurrer, show such long-continued acquiescence of the appellees, and of those for whom they sue, in the annexation proceedings, and such gross laches on their part in the enforcement of their legal rights in the premises, as utterly preclude a court of equity from granting them the relief they ask for in this suit. In this view of the paragraph we concur with appellant's counsel.

In *Hayward v. Nat'l Bank*, 96 U. S. 611, it is said by the Supreme Court of the United States: "Courts of equity often treat a lapse of time, less than that prescribed by the statute of limitations, as a presumptive bar, on the ground 'of discouraging stale claims, or gross laches, or unexplained acquiescence in the assertion of an adverse right.' 2 Story Eq. Jur., section 1520. In *Smith v. Clay* (Amb. 645), Lord CAMDEN said: 'A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, when the party has slept upon his right, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. When these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced.'"

Under the allegations of the second paragraph of answer, the appellees, and those for whom they sued, the residents and property-owners of the annexed territory, acquiesced fully and completely in the annexation proceedings for about seven years. They voted for city officers, they were represented in the common council of the city by councilmen of their own selection, and by their action and the votes of their representatives, large debts were contracted by the city for its improvement, in all the benefits of which they have shared. After such long-continued and unexplained acquiescence in the validity of the annexation proceedings by the appellees,

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and those for whom they sue, it would be manifestly unjust and inequitable, as it seems to us, to allow them and their property to escape the payment of their fair share of the city debts, contracted on the faith of such proceedings. Certainly a court of equity ought not to, and can not, aid them in the accomplishment of any such purpose. If the facts stated in the second paragraph of answer are true, and, as the case is now presented, they must be taken as strictly true, they will constitute, in our opinion, a complete equitable bar to the cause of action stated, or attempted to be stated, in either paragraph of appellees' complaint. The demurrer to this paragraph of answer ought, therefore, to have been overruled.

The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain the demurrers to the second and third paragraphs of complaint, and to overrule the demurrer to the second paragraph of answer, and for further proceedings not inconsistent with this opinion.

Filed Dec. 18, 1884.

No. 11,281.

FASNACHT ET AL. v. THE GERMAN LITERARY ASSOCIATION ET AL.

PRACTICE.—Record.—Bill of Exceptions.—Supreme Court.—Without a bill of exceptions, or order of court, to bring the necessary papers upon the record, motions in the court below to strike out pleadings and papers, or to separate causes of action, can not be considered by the Supreme Court.

CORPORATION.—Mandate.—Officers of a corporation who, upon the expiration of their terms, refuse to deliver to their successors books, papers, accounts, or the like, which came to their hands as such, may be compelled to do so by mandate.

SUPREME COURT.—Evidence.—Bill of Exceptions.—Where it is apparent upon the face of a bill of exceptions, that all the evidence is not in it, a statement that it does contain all is of no avail.

SAME.—New Trial.—Where it was assigned as cause for a new trial, that a witness was allowed to testify as to "usages and customs" of an association; also, that evidence of amendments to its constitution and by-laws was admitted, and no such amendments appear as evidence in the

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bill of exceptions, nor any evidence of "usages and customs," but only of facts from which an inference might or might not be drawn as to such usages, no question is presented to the Supreme Court concerning the matter.

From the Miami Circuit Court.

J. M. Brown, N. H. Antrim, H. J. Shirk and J. Mitchell,
for appellants.

S. D. Carpenter and R. P. Effinger, for appellees.

HAMMOND, J.—This was an action by the appellees against the appellants, former trustees of the said literary association and aid society, to compel the surrender to the appellees, Andres, Nelp and Schlender, present trustees of said corporation, of certain notes and accounts belonging thereto in the hands of the appellants. Appellants appeared, filed a demurrer to the amended complaint, which was overruled, and then answered in four paragraphs. Appellees replied in one paragraph. Trial by the court; finding for the appellees, and judgment on the finding, over the appellants' motion for a new trial.

The proceedings were no doubt intended to be under the statutory provisions relating to the writ of *mandamus*, but the approved practice in such cases seems to have been wholly disregarded by the parties. No affidavit was filed, nor was any motion made for an alternative or peremptory writ of mandate, nor was such writ issued. The action was commenced by complaint and conducted as in ordinary civil actions. For the proper practice in such cases, see sections 1169–1172, R. S. 1881; 2 Works Pr., sections 1447–1450. As no objection, however, was made in the court below to the method of procedure, we will, as this court has heretofore done in similar cases, not consider irregularities of practice, but such questions only as are properly saved in the record. *Smith v. Johnson*, 69 Ind. 55; *Gill v. State, ex rel.*, 72 Ind. 266; *Potts v. State, ex rel.*, 75 Ind. 336; *Duke v. Beeson*, 79 Ind. 24.

It appears from the order-book entries, copied into the

transcript, that appellants made motions, which were overruled, to strike out portions of the amended complaint and to require the appellees to separate and number the causes of action set out in the amended complaint; also that the appellees made motions, which were sustained, to strike out a part of the fourth paragraph of appellants' answer and the fourteenth and fifteenth interrogatories filed with their answer. These rulings are complained of, but as the motions, part of answer and interrogatories referred to, are not in the record, either by bill of exceptions or order of court, the rulings thereon do not present any question which we can consider. 2 Works Pr., section 1077.

The overruling of the demurrer to the amended complaint and the overruling of the motion for a new trial are the only questions in the record for our decision.

The substantial and material averments of the amended complaint are these: On June 6th, 1881, appellants were elected trustees of the appellee, the German Literary Association and Aid Society, for the term of one year, at the expiration of which they were succeeded by the appellees Andres, Nelp and Schlender, who were then duly elected as such trustees and qualified and entered upon the discharge of the duties of their office. Appellants, during their term of office, came into the possession of notes and accounts of said society, with which they were entrusted and which they legally received as such trustees, but which they declined to deliver to their said successors in office.

We think the law is well established that an officer whose term has expired may be compelled by mandate to surrender to his successor all records, books and papers pertaining to his office. *Frisbie v. Fogg*, 78 Ind. 269; High Ex. Legal Rem. (2d ed.), section 74; Field Private Corp. (2d ed.), section 464.

The appellants having failed, on demand, according to the allegations of the complaint, to deliver to their successors in office the notes and accounts which they should have thus surrendered, *mandamus* was the proper remedy to compel the

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discharge of this duty. The amended complaint stated facts sufficient to make it good upon demurrer, and there was, consequently, no error in overruling the demurrer to it.

Three causes were assigned as grounds for a new trial. The first and third were that the decision was not sustained by sufficient evidence, and was contrary to law. It affirmatively appears from the bill of exceptions that it does not contain all the evidence. It shows that the new constitution of the appellee, the German Literary Association and Aid Society, was read in evidence, but does not contain the same. Where a question to be determined in this court depends upon the evidence, the bill of exceptions must show affirmatively that it contains "all the evidence given in the" cause, and this affirmative showing is not sufficient where the bill, as in the present case, shows upon its face that it does *not* contain all the evidence. *Wallace v. Kirtley*, 98 Ind. 485; 2 Works Pr., section 1078.

The second ground for a new trial was for alleged errors occurring during the trial, in this: (1) "The allowing of John Bauer to testify as a witness as to the usages and customs of said association and society over the objections of the defendants made at the time;" and (2) "the allowing of the introduction as evidence of purported amendments to the constitution and by-laws of said association and society prepared by one Henry Meinhardt over the objections of the defendants made at the time."

In answer to the first specification of alleged error, it is sufficient to say that the record does not contain any evidence of said witness as to the usages and customs of said association and society. The witness testified to certain facts, occurring in the transactions of the society, from which it is possible that the usages and customs of the society might be inferred. But if the appellants wished to make the introduction of evidence as to such facts a ground for a new trial, such evidence should have been pointed out in the motion, and not the inferences or the facts which such evidence tended

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to prove. A motion for a new trial on the ground of the improper admission or exclusion of evidence must point out the evidence admitted or excluded with such certainty as will call the attention of the court and adverse party to it. 1 Works Pr., section 929.

As to the second specification of alleged error occurring at the trial, the amended constitution and by-laws referred to are not in the bill of exceptions. Even if the evidence as to the manner of the adoption of these amendments show, as appellants claim, that they were not properly adopted, still, not having the amendments before us, we can not say but that the evidence complained of was harmless. This court will not reverse a judgment for an error which did not affect the substantial rights of the party appealing. That such rights were affected, as well as that there was error, must appear from the record.

There was no error in overruling appellants' motion for a new trial. Affirmed, with costs.

Filed Dec. 18, 1884.

No. 11,003.

JUNK ET AL. v. BARNARD.

VENDOR AND VENDEE.—*Title-Bond.*—*Breach.*—*Failure of Title.*—The breach of a condition in a title-bond to execute a warranty deed constitutes a cause of action, though it be stipulated in the bond that "the grantee agrees to accept the property with the understanding that he is to get possession of the tenant in possession."

SAME.—*Damages.*—In such case, damages to the extent of the purchase-money paid, with interest at 6 per cent. per annum, can not be deemed excessive.

From the Cass Circuit Court.

T. J. Tuley, S. T. McConnell, R. Magee and D. B. McConnell, for appellants.

M. Winfield and C. E. Taber, for appellee.

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BICKNELL, C. C.—The appellee brought this suit against the appellants upon a title-bond, dated September 25th, 1876, which recited a sale of land by the appellants to the appellee, and the terms of the sale, and was conditioned for the execution of a warranty deed by the appellants to the appellee within three months after its date. The complaint averred payment of the purchase-money. There was a provision in the bond that the grantee accepted the property with the understanding that she was to get possession of it from the tenant in possession. The breaches alleged in the complaint were that the appellants, although requested, have not made the warranty deed, and that they never had title to the land.

The defendants filed an answer in four paragraphs and also a counter-claim, viz. :

1. The general denial.
2. That the plaintiff's claim was fully paid and satisfied before suit brought.
3. That the plaintiff's claim was wholly without consideration.
4. That at the time of the sale the defendants had never seen the land, and did not know who had possession of it, except by the statements of the plaintiff; that the plaintiff came to them and proposed to buy the land, claiming to be acquainted with the title, and with the claim of one Cook the then tenant in possession; that defendants told the plaintiff, they knew nothing of the title; that they had taken the land in payment of a doubtful debt, without any inquiry as to title or possession; that plaintiff replied that she knew about the title and knew that said Cook had no title and was in possession unlawfully; that the parties then agreed that the plaintiff should give the defendants the notes mentioned in the bond, and that upon payment according to the bond, the defendants should give plaintiff a quitclaim deed for the land; that the defendants never agreed to give a warranty deed, but that, by the mutual mistake of the parties, the agreement as to a quitclaim deed was omitted in the bond and

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instead thereof the provision for a warranty deed was inserted ; that by the agreement the plaintiff was not to be entitled to any deed until the notes mentioned in the bond were paid, and even then was to be entitled to a quitclaim deed only ; that afterwards, the mistake being discovered, the parties compromised the plaintiff's claim, and the plaintiff agreed to surrender the bond and take a quitclaim deed, and the defendants agreed to execute said quitclaim at once without waiting for the payment of said notes, and the plaintiff thereupon surrendered said bond and accepted in place thereof a quitclaim deed for said land, executed by defendants. Wherefore, etc.

The defendants also filed a counter-claim alleging substantially the same facts set up in the fourth paragraph of answer, and praying that the bond be reformed, etc.

The plaintiff replied in denial of each of the special defences, and answered in denial of the counter-claim. The issues were tried by a jury, who returned a verdict for the plaintiff, with \$801.53 damages.

A motion for a new trial by the defendants was overruled ; judgment was rendered on the verdict, and the defendants appealed. There are several errors assigned, but the only matters discussed in the appellants' brief are the sufficiency of the complaint, the sufficiency of the evidence, and the question whether the damages are excessive.

The appellants claim that because the bond contains the provision that "the grantee agrees to accept the said property with the understanding that he is to get possession of the tenant in possession," therefore there is no cause of action on the bond, but the condition of the bond being that the defendants shall make a warranty deed, the breach of the condition gives a cause of action, notwithstanding the agreement of the plaintiff as to getting the possession. We think the complaint was sufficient. As to the sufficiency of the evidence, the testimony was conflicting ; there was evidence tending to support the verdict. In such a case this court can

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not interfere with the verdict of the jury, supported by the action of the trial court in overruling a motion for a new trial. *Lake Erie, etc., R. W. Co. v. Everett*, 86 Ind. 229.

We think the damages were not excessive; the jury gave the plaintiff the money she had paid, with 6 per cent. interest. We think this was right. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellants.

Filed Dec. 19, 1884.

No. 11,764.

SMITH v. UHLER.

PRACTICE.—*Trial by Court.*—*Taking Under Advisement.*—*Motion to Set Aside Finding.*—*Statute Construed.*—The requirement of section 551, R. S. 1881, that the court trying an issue shall not hold the matter under advisement more than 60 days, is directory, and a failure to obey it will not affect the determination when made afterwards.

SAME.—*Special Finding.*—The court must make a special finding of the facts, and its conclusions of law thereon, when properly requested; but such request must be shown either by an order-book entry, by bill of exceptions, or by the special finding itself.

From the Jackson Circuit Court.

B. H. Burrell and *F. Emerson*, for appellant.

W. K. Marshall, for appellee.

COLERICK, C.—The appellant sued the appellee for damages, which he alleged in his complaint were sustained by him in consequence of certain false and fraudulent representations that were made to him by the appellee to effect an exchange between them of certain property. As no question arises on the pleadings in the action, it is unnecessary to refer to them. The issues were tried by the court, and resulted in the rendition of a finding and judgment in favor of the appellee.

The record shows that the trial was concluded on the 28th day of April, 1883, and that the case was then taken under advisement by the judge, who, afterwards, on the 5th day of

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July, 1883, filed, in writing, his determination therein as required by the statute (R. S. 1881, section 551), at which time court was not in session, and more than sixty days had expired from the time the action was taken under advisement. On the first day of the next term of the court thereafter the appellant moved the court to set aside the submission of, and the determination of the court in, said action, because: 1st. The judge failed to file his determination therein within sixty days from the time the action was taken under advisement as required by the statute. 2d. The court neglected and omitted to make a special finding of the facts in the action, and its conclusions of law thereon, as requested by the appellant. And also then moved the court for a *venire de novo*, assigning as the sole cause for its support the failure of the judge to file his determination in the action within the time prescribed in the statute. Both of these motions were overruled, and, thereupon, the appellant moved the court for a new trial, which motion was also overruled, and these several rulings are the only errors assigned by the appellant for the reversal of the judgment.

No error was committed by the court in refusing to set aside its determination in the action because it was not filed within the time required by the statute. See *Jones v. Swift*, 94 Ind. 516, where the statute referred to was construed by this court adversely to the views that are urged by the appellant in this case. It was there said: "This statute is of a remedial nature, and was, evidently, enacted in the interest and for the benefit of litigants, in expediting the final disposition of their actions in courts of justice, by requiring the judges thereof trying the same, to render within a reasonable time, so prescribed, their decisions therein. It is to be construed as a rule for the government of the court, and as a compulsory means of compelling judges to render prompt decisions in actions tried by them, so as to mitigate, to that extent, the annoyance and expense incident to protracted litigation. It will not do to hold that this statute may be used as

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a weapon against the successful litigant, for whose protection it was enacted, by rendering ineffectual the judgment rendered in his favor, because the judge violated or failed to observe its provisions. To avoid such injustice the statute must be construed as directory." Also, *Martin v. Pifer*, 96 Ind. 245; *Vogle v. Grace*, 5 Minn. 294.

We have been unable to discover, after a careful examination of the record, any entry in the order-book or recital in the bill of exceptions, showing that the court was requested by either party to make a special finding of the facts in the case and its conclusions of law thereon. It is true that it is recited in the motion above referred to, which is embodied in a bill of exceptions, that such request had been made by the appellant, but this is not sufficient to show that it was, in fact, made. The bill of exceptions merely shows that the motion was overruled; it does not state that the facts recited in the motion are true, or that any such request was made. It must affirmatively appear by an entry in the order-book of the court, or by a bill of exceptions, or by the special finding of facts itself, that such a request was made; otherwise this court can not say that it was made. If it had been properly made by the appellant in this case, it would have been the imperative duty of the court below to have complied with the request by making such special finding. R. S. 1881, section 551. As the record fails to show that any such request was made, we can not hold that the court erred in overruling the motion to set aside its determination in the action because no such special finding was made.

The only reasons assigned in support of the motion for a new trial, that have been urged in this court and discussed by the appellant in his brief, are that the finding of the court was not sustained by sufficient evidence, and was contrary to the evidence and the law. The evidence is in the record. It is conflicting, but strongly tends to sustain the finding of the court, and, therefore, under the well settled practice of this court, we are precluded from disturbing the finding on the weight of the evidence. The finding was not contrary to law.

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This disposes of all the questions submitted for our consideration, and as there is no error in the record, the judgment ought to be affirmed.

PER CURIAM.—The judgment of the court below is affirmed, at the costs of the appellant.

Filed Dec. 19, 1884.

No. 11,551.

HEDRICK v. D. M. OSBORNE & CO.

COMPLAINT.—*Defect Cured by Verdict.*—A complaint, defective for want of the averment of a fact which may be inferred by reasonable intendment, is cured by verdict.

BILL OF EXCEPTIONS.—*Evidence.*—To present for review the admission of evidence objected to, it is not necessary that the bill of exceptions shall contain all the evidence given upon the trial.

ATTACHMENT.—*Suit on Bond.*—*Evidence.*—*Record.*—*Misnomer.*—*Parties.*—*Partnership.*—*Name.*—*Corporation.*—Suit by "D. M. Osborne & Co." upon an attachment bond given in a suit against D. M. Osborne and others unknown, described as partners, in which "D. M. Osborne & Co." appeared.

Held, that the plaintiff could maintain the suit, having been really the defendant in the attachment suit, though by a wrong name and description, and that the record of that suit was admissible in evidence for the plaintiff, and so also was proof that the writ of attachment was levied upon the plaintiff's property.

VARIANCE.—*Amendment.*—A variance which could not mislead the opposite party requires no amendment to avoid it, and is wholly immaterial.

From the Vermillion Circuit Court.

T. F. Davidson and W. B. Durborrow, for appellant.

J. McCabe, E. F. McCabe and J. G. Pearson, for appellee.

ELLIOTT, J.—The complaint of the appellee alleges that it is a corporation organized under the laws of New York; that one Thompson Roe instituted proceedings in attachment against it, and that the bond filed in the proceedings was signed by the appellant as a surety. It is not directly alleged that a writ of attachment was issued, but it is alleged

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that "in obedience to the writ of attachment issued in said cause, the sheriff levied upon and attached the property of the plaintiff."

The complaint was not questioned in the court below in any form, but is here assailed by the assignment of errors. The counsel for appellant thus state their objection: "The objection to the complaint is that it nowhere directly alleges that a writ of attachment was issued." It is our opinion that this objection can not prevail. It has long been a rule of pleading that many defects, available upon demurrer, are cured by a finding or verdict. This rule applies here. There are facts stated in the pleading, which, by reasonable intendment, enable us to decide that a writ of attachment was issued, and this is sufficient to shield the complaint from such an attack as the present. *Murphy v. Murphy*, 95 Ind. 430; *Jones v. White*, 90 Ind. 255; *Puett v. Beard*, 86 Ind. 104; *Shimer v. Bronnenburg*, 18 Ind. 363.

The appellant complains of the ruling of the trial court in admitting the transcript of the record in the attachment proceedings, and the appellee contends that the bill of exceptions does not properly present this question, for the reason that all of the evidence is not in the record. It is not always necessary to bring all the evidence into the record, in order to present a ruling admitting or excluding evidence, but it is always necessary to incorporate so much of it as shows the full character of the ruling, and exhibits the asserted error. *Johnson v. Wiley*, 74 Ind. 233; *Stout v. Woods*, 79 Ind. 108; *Shorb v. Kinzie*, 80 Ind. 500; *Shimer v. Butler University*, 87 Ind. 218, *vide* p. 220; *Pavey v. Wintrobe*, 87 Ind. 379, p. 381; *McClellan v. Bond*, 92 Ind. 424; *Conden v. Morningstar*, 94 Ind. 150. The appellee is wrong in stating as broadly as he does the proposition that all of the evidence must invariably be in the record, for there are cases where rulings admitting or excluding testimony may be presented without the entire evidence.

The evidence, which the appellee asserts was omitted from

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the first bill of exceptions filed by the appellant, was the second paragraph of the complaint filed in the attachment proceedings by the plaintiff therein, but we find, on examination, that this was struck from the files on the motion of the defendant in that case, so that it formed no part of the record. Its presence or absence does not affect the question arising on the ruling admitting the transcript of the proceeding in the case in which the attachment was issued.

The affidavit for attachment and the complaint in the case instituted by Thompson Roe charged that the defendant, in that case, constituted a partnership composed of D. M. Osborne, and other persons to the plaintiff unknown, and it is insisted that it was error to admit in evidence the transcript of the record in that case, for the reason that here the plaintiff appears as a corporation, and can not maintain an action upon a bond executed in proceedings against a partnership. In the argument upon this point counsel for the appellant lose sight of the important fact that D. M. Osborne & Co. appeared to the action in which the attachment was issued, and that the plaintiff, in that proceeding, after having seized the property of D. M. Osborne & Co. under the writ, voluntarily dismissed the proceedings. It appears from this fact that it was the present plaintiff and appellee against whom the attachment was directed, and that the property seized belonged to it, and that to it was all the injury done. The seizure and the consequent injury are attributable to the wrongful proceedings in the attachment case, and the law, in requiring a bond, intends to secure protection to those who are proceeded against as defendants, and whose property is attached by virtue of the writ sued out by the attaching plaintiff. The identity of the parties was established by proper evidence, and it seems plain that the party who is sued as defendant, and as defendant sustains injury, is entitled to redress. The case is altogether different from one in which the sheriff, in executing the writ, levies upon the property of some per-

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son other than the one named as defendant, for here the sheriff obeyed the writ which issued pursuant to the demand of the attaching plaintiff, and the wrong resulted from the acts of that party. The utmost that can be said is that the plaintiff in attachment sued the defendant by the wrong name, and that the latter elected to appear without suggesting the misnomer, but it does not follow from this that the real defendant may not recover on the bond in his true name. The attachment was directed against the appellee; there is no doubt as to the identity of the person; the only error of the plaintiff in the attachment proceedings was as to name. The writ was meant to reach, and it did reach, the appellee's property, and as it was intended by the attaching plaintiff to accomplish this purpose, and did, in fact, accomplish it, we do not see any just reason why the person really injured and really meant to be reached by the attachment should be denied a recovery on the bond. To hold that an attaching plaintiff, in such a case as this, might sue the defendant in the wrong name, or under the wrong description, and on that ground escape liability on the bond, would, it is easy to see, be productive of great injustice.

It may be true, as a general rule, that it is only the defendant who can maintain an action on the attachment bond, and that a stranger can not have an action although his property may be seized. Drake Attachment, section 162. But the party who brought this action was not a stranger; the bond was intended to secure the party against whom the proceedings were instituted and whose property it was intended to reach, and the present plaintiff was that party, although wrongly described in the complaint and affidavit in attachment. The person against whom the proceedings were directed was the present plaintiff, but a wrong name and description were assigned. There is a complete identity, although there is a misnomer. The first case cited by the author to whom we have referred is *Raspillier v. Brownson*, 7 La. 231 (4 N. S. 149), where it was held that a third per-

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son could not maintain an action on the bond, the court saying: "Besides the obvious objection that Raspillier was not a party to the bond, and that there existed no privity of contract between him and the appellee, it appears that final judgment had already been rendered in the case, as to the principal demand, and it was too late to engraft upon it any new incidental question." The case of *Edwards v. Turner*, 6 Rob. (La.) 382, decides nothing more than that an attachment bond does not enure to the benefit of a third person. In *Davis v. Commonwealth*, 13 Grat. 139, the court thus stated the point presented for decision: "And the question resolves itself simply in this, Whether, if such an attachment be levied on the property of a stranger, he can maintain an action therefor on the attachment bond?" Neither of these cases is in point here, for the action on the bond is not by a stranger, but is by the attachment defendant in its true name, for it was against the appellee that the proceedings were instituted, although it was not sued by its true name, and there is, therefore, direct privity of contract. Any other conclusion than that we have reached would result in ruling that where there was an error in naming or describing the attachment defendant, the bond could not be made available for the benefit of anybody, and this would be rank injustice.

We have no doubt that it was necessary for the appellee to prove that it was the person against whom the attachment proceedings were directed. There was, however, evidence from which this fact was fairly and justly inferable, and this is enough to support the finding of the trial court. In civil cases the rule has always been that it is sufficient if there is evidence leading by legitimate inference to the conclusion reached by the court or jury that tried the case, and it is not necessary that the fact should be directly established by positive evidence. 1 Greenl. Ev., section 13 a; *Indianapolis, etc., R. R. Co. v. Collingwood*, 71 Ind. 476; *Indianapolis, etc., R. W. Co. v. Thomas*, 84 Ind. 194.

It was proper for the appellee to prove that the writ sued

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out by Roe was levied on property of which it was the owner, for this was a fact tending to show that the proceedings were directed against it, and meant to operate upon its property as that of the attachment defendant. The presumption is that the officer did his duty and executed the writ according to law. The evidence upon this point was competent, not for the purpose of proving that there was a wrongful seizure of the property of a third person, but for the purpose of proving that the appellee was really the attachment defendant, for it tended to establish that fact, and as it tended to do this it was competent. *Boots v. Canine*, 94 Ind. 408; *Nave v. Flack*, 90 Ind. 205 (46 Am. R. 205); *Harbor v. Morgan*, 4 Ind. 158; *Hall v. Henline*, 9 Ind. 256.

We have already copied one of the allegations of the complaint showing that a writ of attachment was issued against the appellee, and we add the following (found at other places in the complaint), namely: "That in obedience to the writ of attachment issued in said cause the sheriff levied upon and attached the following property of the plaintiff." "Plaintiff was compelled to employ attorneys for the defence of said action and attachment proceedings." The allegations of the pleading fully show that the action was against the appellee, and that the bond sued on was given to secure an attachment in that cause, so that the appellant could not, in any way, have been misled by the pleading, nor left in doubt as to the cause of action urged against him. If it were conceded that the complaint should have more formally stated the mistake in describing the appellant, that would not avail, because it was a defect, if a defect at all, amendable in the trial court, and, by force of an imperative statute, to be deemed amended here. R. S. 1881, section 658.

A variance between the allegations of the pleading, and the evidence is, to quote from our statute, to be deemed immaterial "unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defence upon the merits." R. S. 1881, section 391. If, therefore, it were conceded

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that there was here some variance, still, as it is very evident that it was not a material one, it will not justify a reversal.

Judgment affirmed.

Filed Dec. 19, 1884.

No. 11,500.

PENNSYLVANIA COMPANY v. NIBLACK.

PRACTICE.—*Judgment.—Exceptions.—Bill of Exceptions.—Supreme Court.*—

Without a bill of exceptions showing specific objections, an exception to the form or substance of a judgment presents no question in the Supreme Court.

SAME.—*Trial by Agreed Case.—Agreement.—Evidence.—Record.*—Where the record shows pleadings, and an issue and trial by the court, and a general finding, though the facts are agreed upon in writing, with an affidavit annexed showing that the controversy is real, it is not an agreed case under section 553, R. S. 1881, but the agreement is simply evidence, and is no part of the record unless made so by bill of exceptions or order of court.

SAME.—*Assignment of Errors.—Case Explained.*—In such case an assignment of error, that the court "erred in rendering judgment for the appellee," presents no question in the Supreme Court. *Warrick, etc., Ass'n v. Hougland*, 90 Ind. 115, explained.

From the Knox Circuit Court.

S. O. Pickens, for appellant.

G. G. Reily and *W. C. Niblack*, for appellee.

HAMMOND, J.—This was an action by the appellant against the appellee to quiet title to real estate. The appellee answered by the general denial. There was a trial by the court upon an agreed statement of facts, which is copied by the clerk in the transcript, and which premises, that, "For the purpose of the trial of this case, it is agreed by plaintiff and defendant that the facts in this case are as follows:" then follows a statement of the facts agreed upon. An affidavit is filed to the effect that the controversy is real and the proceedings in good faith to determine the rights of the parties. The court, upon this statement of facts, found for the appel-

99	149
129	122
99	149
144	348
141	381
147	228
99	149
149	553

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lee. No exception was taken to the finding. The appellant moved for a new trial on the ground that the finding was contrary to the law and the evidence. This motion was overruled; the appellant excepted, and was given sixty days in which to file a bill of exceptions, but the same was never filed. Judgment was rendered for the appellee that the appellant take nothing by its complaint, and that the appellee recover of the appellant his costs, to which judgment, as the clerk recites in the record, the plaintiff excepted. The only error assigned by the appellant in this court is as follows: "The court erred in rendering judgment in favor of the appellee and against the appellant on the agreed statement of facts submitted."

It is manifest that the record presents no question for our consideration touching the merits of the controversy between the parties. An exception to the form or substance of a judgment, unless presented in a bill of exceptions showing the specific objections that were urged against the judgment in the court below, brings nothing before this court for its decision. *Teal v. Spangler*, 72 Ind. 380; *Douglass v. State*, 72 Ind. 385; *Adams v. LaRose*, 75 Ind. 471; *Merritt v. Pearson*, 76 Ind. 44; *Ex Parte Hayes*, 88 Ind. 1; *Whipple v. Shewalter*, 91 Ind. 114; 2 Works Pr., section 1030. In any event, the objection to a judgment could only go to its form or substance and could not present any question as to the sufficiency of the evidence to sustain the finding or verdict upon which it was rendered. The judgment in the present case was such as was authorized by the pleadings and the finding of the court, and we can not see what valid objection can be urged against it.

This was not an agreed case under section 553, R. S. 1881, but it was a trial upon an agreed statement of facts used merely as evidence. But it is not material whether it be considered as an agreed case or a trial upon an agreed statement of facts used simply as evidence. In either case the record presents no question. In an agreed case under section 553,

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supra, no pleadings are required, nor is a motion for a new trial necessary. But to present any question to this court there must have been an exception taken to the conclusions of law upon the agreed facts, and such conclusions must be assigned as error in this court. Neither of these things has been done in the present case. In a trial upon an agreed statement of facts, as the evidence in the case, such statement does not become a part of the record unless made so by bill of exceptions or order of court. Neither of these methods was adopted to bring the evidence into the record. Consequently the evidence is not before us; and besides, even if the evidence were in the record, we could not consider it, as no error is assigned on the overruling of the appellant's motion for a new trial. These conclusions are amply sustained by numerous decisions of this court. *Fisher v. Purdue*, 48 Ind. 323; *Carlton v. Cummins*, 51 Ind. 478; *Manchester v. Dodge*, 57 Ind. 584; *State, ex rel., v. Board, etc.*, 66 Ind. 216; *Martin v. Martin*, 74 Ind. 207; *Slessman v. Crozier*, 80 Ind. 487; *Lofton v. Moore*, 83 Ind. 112; *Western Union Tel. Co. v. Frank*, 85 Ind. 480; *Zeller v. City of Crawfordsville*, 90 Ind. 262; *Hall v. Pennsylvania Co.*, 90 Ind. 459; Busk. Pr. 255; 1 Works Pr., sections 249, 811, 812, 813.

As the record comes to this court we are compelled to affirm the judgment of the court below. Affirmed, with costs.

NIBLACK, J., did not participate in the decision of this case.

Filed June 28, 1884.

ON PETITION FOR A REHEARING.

HAMMOND, J.—Appellant claims that the conclusion reached in the foregoing opinion is in conflict with the *War-rick Building and Loan Ass'n v. Hougland*, 90 Ind. 115. It appears from the statement of that case that there was an exception to the judgment, but whether there was any exception to the finding or conclusions of law on the agreed facts is not shown. The precise question of practice involved in this case was not considered in that. The opinions of this

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court usually state only so much of the record as is essential to clearly present the questions controverted. It was said in the case cited that "there must be an exception to the decision of the court upon the agreed statement of facts, in order to reserve any question for this court." It was not decided in that case that an exception to the judgment was sufficient. It clearly is not, as is shown in the cases cited in the principal opinion. We could not change our conclusions without overthrowing a number of well considered cases. The practice to which we adhere is in harmony with that in the analogous case of a special finding of facts, where, to save any question for this court, there must be an exception to the conclusions of law. 1 Works Pr., section 809.

Petition for a rehearing overruled.

NIBLACK, J., took no part in the decision of this case.

Filed Dec. 20, 1884.

No. 11,918.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY v. NICE.

NEW TRIAL.—*Demurrer to Evidence.*—That a demurrer to the evidence was improperly overruled is not a cause for new trial.

ASSIGNMENT OF ERROR. — If only one of several paragraphs of a complaint be good, an assignment of error that the complaint was bad for want of sufficient facts is not supported.

RAILROADS.—*Fencing.*—If the circumstances are such as to justify a failure to fence one side of a railroad track, none is required on the other side, as where on one side freight is loaded and discharged, and there is a saw-mill and grain elevator from which lumber and grain are laden on the cars for shipment.

SAME.—*Killing Stock.—Contributory Negligence.*—One who voluntarily permits his cattle to run at large near a railroad, where it is not required to be fenced, is guilty of contributory negligence, if the cattle stray upon the track and are killed by the negligent management of a train of cars passing upon the railroad, and he can not recover.

From the Miami Circuit Court.

The Wabash, St. Louis and Pacific Railway Company v. Nice.

C. B. Stuart and W. V. Stuart, for appellant.

J. L. Farrar, J. Farrar and W. C. Farrar, for appellee.

BICKNELL, C. C.—The appellee brought this suit before a justice of the peace to recover damages from the appellant for a cow killed by the cars of the appellant on its railway.

The complaint before the justice was in one paragraph, and he rendered a judgment for the plaintiff by default.

In the circuit court the defendant demurred to the complaint for want of facts sufficient. The demurrer was overruled. The plaintiff then filed a second paragraph of complaint, and the defendant answered the entire complaint by a general denial. The issues were submitted to a jury for trial, and the plaintiff having introduced his evidence, the defendant demurred to it. The court overruled the demurrer, and assessed the plaintiff's damages at \$60.

The defendant's motion for a new trial was overruled, and judgment was rendered on the assessment. The defendant appealed. The errors assigned are :

1. Overruling the demurrer to the complaint.
2. That the complaint does not state facts sufficient.
3. Overruling the demurrer to the evidence.
4. Overruling the motion for a new trial.

There was no error in overruling the motion for a new trial. The only reason alleged for the new trial is error of the court in overruling the demurrer to the evidence. This is not a valid reason for a new trial; it belongs to the assignment of errors.

As to the first specification of error, viz., overruling the demurrer to the complaint, there was no demurrer to the complaint; there was a demurrer to the first paragraph only. The plaintiff claims that the first paragraph of the complaint does not state that the road was not securely fenced. In this the appellant is mistaken. The averment in the complaint is, that where the cow went on the track, the railroad was not fenced and could not be. *Louisville, etc., R. W. Co. v. Argen-*

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bright, 98 Ind. 254 ; *Indianapolis, etc., R. R. Co. v. Sims*, 92 Ind. 496 ; *Wabash R. W. Co. v. Forshee*, 77 Ind. 158. The first paragraph of the complaint was sufficient before a justice of the peace.

As to the second specification of error, to wit, that the complaint does not contain facts sufficient, there being two paragraphs of complaint, if either of them is sufficient, this specification can not be sustained. The first paragraph was sufficient.

As to the third specification of error, to wit, overruling the demurrer to the evidence, a railroad company is not bound to fence its track at the open space, in front of a mill, necessary for the convenience of shipment. *Indianapolis, etc., R. R. Co. v. Kinney*, 8 Ind. 402 ; *Pittsburgh, etc., R. W. Co. v. Bowyer*, 45 Ind. 496. Nor in the immediate vicinity of the engine house, machine shops, car-house and wood-yard of the company. *Indianapolis, etc., R. R. Co. v. Oestel*, 20 Ind. 231 ; *Jeffersonville, etc., R. R. Co. v. Brevoort*, 30 Ind. 324. Nor where it would deprive the company of its own land or leased property. *Jeffersonville, etc., R. R. Co. v. Beatty*, 36 Ind: 15. Nor at stations or sidings where freight or passengers are received or discharged. *Indianapolis, etc., R. R. Co. v. Christy*, 43 Ind. 143 ; *Indianapolis, etc., R. W. Co. v. Crandall*, 58 Ind. 365 ; *Lake Erie, etc., R. W. Co. v. Kneadle*, 94 Ind. 454 ; *Evansville, etc., R. R. Co. v. Willis*, 93 Ind. 507.

There was evidence tending to show that the defendant's road runs east and west through a small place called Chili, where the defendant has a station and depot ; that the defendant has a side track extending eastward from the depot about 250 yards, and on the south side of the main track ; that in connection with said side track the defendant has built and maintains stock yards ; that between the depot and the stock yards the ground next to the side track is several feet higher than the side track, and from that high ground freight is loaded on and unloaded from the cars on the side track ; that there is also between the depot and the stock yards, and on

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the south side of the road, a saw-mill, and that materials for and from it are loaded and unloaded at different places along said side track; that on the north side of the track, and about 100 yards east of the depot, is a grain house, used for storing, elevating and shipping grain; that there is no railroad fence on either side of the track between the depot and the stock pens. The evidence does not show where the cow entered on the track, but it does tend to show that she was permitted to run at large in the vicinity aforesaid, and that when first seen on the day of the killing she was straying upon the railroad ground between the main track and the side track, and between the depot and the cattle pens, from twenty-five to fifty yards westward from the cattle yards, and that after she was struck by the train she lay nearly opposite the grain house; that the train was a passenger train coming from the east, at ordinary speed, and that it gave the usual signals.

Upon this evidence the defendant was not bound to fence its road between the depot and the cattle yards. *Cincinnati, etc., R. R. Co. v. Wood*, 82 Ind. 593. Under the facts above appearing, a road not required to be fenced on one side need not be fenced opposite thereto on the other side. *Indiana, etc., R. W. Co. v. Leak*, 89 Ind. 596. The evidence, therefore, was not sufficient to show a liability of the defendant as for a killing without negligence, and the evidence tended to show that the defendant was not guilty of any negligence. But even if there were proof of negligence in the defendant, the plaintiff could not recover, because he failed to show want of contributory negligence in himself. There was evidence tending to show that the plaintiff permitted his cow to run at large in the vicinity of the railroad, where it was not and could not be legally fenced. This was contributory negligence on his part. In *Indianapolis, etc., R. W. Co. v. Caudle*, 60 Ind. 112, this court said: "The first that the evidence shows us of the cow, she was running at large between the railroad track and a fence, fifteen feet west of it, where she had no right to be, as far as the evidence shows us. This was *prima*

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facie negligence on the part of the owner." *Indianapolis, etc., R. R. Co. v. Harter*, 38 Ind. 557; *Jeffersonville, etc., R. R. Co. v. Underhill*, 48 Ind. 389; *Jeffersonville, etc., R. R. Co. v. Adams*, 43 Ind. 402; *Cincinnati, etc., R. R. Co. v. Street*, 50 Ind. 225.

The demurrer to the evidence ought to have been sustained. For the error of the court in overruling said demurrer the judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things reversed, and this cause is remanded with instructions to the court below to sustain the defendant's demurrer to the plaintiff's evidence, and render judgment accordingly.

Filed Dec. 19, 1884.

No. 11,981.

BENSON v. BACON.

PRACTICE.—*Pleading*.—*Harmless Error*.—A judgment will not be reversed for erroneously overruling a motion to strike out part of a pleading.

ASSAULT AND BATTERY.—*Trespass*.—*Complaint*.—A complaint to recover damages for an assault and battery need not aver in terms that the assault and battery was unlawful.

MALICIOUS PROSECUTION.—*Complaint*.—In a complaint for malicious prosecution, the want of probable cause is properly shown by general averment of the fact, and it is not necessary or proper to allege the evidence of the fact.

SAME.—*Probable Cause*.—*Instruction*.—In such case an instruction that if the prosecution alleged was not set on foot for a public purpose, then there was no probable cause, is erroneous.

From the Harrison Circuit Court.

B. P. Douglass and *S. M. Stockslager*, for appellant.

C. W. Cook, for appellee.

ELLIOTT, J.—It is established by many decisions of this court that a judgment will not be reversed on the ground

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that a motion to strike out a part of a pleading was improperly overruled.

The first paragraph of the complaint seeks to recover for injuries resulting from an assault and battery alleged to have been committed upon the appellee by the appellant. The objection urged to this paragraph of the complaint is that it does not employ the word "unlawful" in charging the assault and battery. The approved precedents do not contain the word *unlawful* or its equivalent, and we are not willing to hold the complaint bad because of the omission to use this term. 2 Works Pr. 645; 2 Chitty Pl. (13 Am. ed.) 852; Bullen & Leake Prec. 411; Oliver Prec. 719; 1 Estee Pl. 560. It is true that in indictments it is necessary to use the term unlawful or its equivalent, but it is well known that there is an essential difference between civil actions and criminal prosecutions. *Howard v. State*, 67 Ind. 401. If, however, we are in error in yielding to the authority of the precedents which have so long ruled pleaders, we should still be compelled to hold the pleading good. The reason for this is, that the facts specifically pleaded show that the assault and battery was an unlawful one. *Bloom v. Franklin Life Ins. Co.*, 97 Ind. 478; *Norris v. Casel*, 90 Ind. 143.

The second paragraph of the complaint alleges as a cause of action that the defendant instituted a malicious prosecution against the plaintiff without probable cause. The defect which counsel suppose exists in this paragraph is that it does not state the facts constituting the want of probable cause. In our opinion the defect is an imaginary and not a real one. The want of probable cause is a fact, and it is always sufficient to state the facts without pleading the evidence which proves the fact. *Scotten v. Longfellow*, 40 Ind. 23; 2 Works Pr. 646; 2 Chitty Pl. 616; *Adams v. Lisher*, 3 Blackf. 241 (25 Am. Dec. 102). It would be impracticable, and indeed almost impossible, for a plaintiff to specifically set forth the facts constituting a want of probable cause, for, owing to the negative form of the fact, it would be necessary for him to anticipate and an-

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swer every conceivable state of facts that might constitute probable cause. When the defendant justifies the case is different, for, as he pleads affirmative facts, known to him and upon which his acts were based, he can set them out affirmatively, and it seems to be the rule that where he pleads affirmatively and by way of justification, he must plead the facts specially. *Brown v. Connelly*, 5 Blackf. 390. The cases which counsel cite to sustain their attack upon the complaint, *Adams v. Lisher*, *supra*, and *Hays v. Blizzard*, 30 Ind. 457, are against and not for them. In the latter case the allegation in the complaint upon this point was not stronger than in the present, and it was held that the demurrer was properly overruled.

The fourth instruction given upon the request of the plaintiff reads thus: "The jury are instructed that if they believe from the evidence that the prosecution of the plaintiff as shown by the evidence was not undertaken by the defendant for a public purpose, then the defendant had not probable cause."

In support of this instruction the appellee quotes from the text of a standard author the following: "Probable cause * * is understood to be such conduct on the part of the accused as may induce the court to infer that the prosecution was undertaken from public motives," and from a note to the text he quotes the following: "The plaintiff must show that the conduct of the defendant was such as to lead to the inference that the prosecution was not undertaken from public purposes." 2 Greenl. Ev., section 454. The appellee, in asserting that his instruction is sustained by the doctrine declared in the extracts quoted, violates a plain rule of elementary logic. It is by no means true that because the plaintiff must exclude the inference that the defendant undertook the prosecution for public purposes, therefore, there is no probable cause unless it be shown in defence that he did undertake it for that purpose. If there was probable cause for instituting the prosecution,

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then the person who instituted it is not liable to an action for malicious prosecution although he was not influenced by a desire to promote the public good. It can not, therefore, be inferred from evidence that the prosecution was not undertaken for a public purpose, that there was no probable cause. If it be shown that there was probable cause for the prosecution, then the defence is made out, although it may not be proved that the prosecution was undertaken for a public purpose. It is not necessary to show facts constituting probable cause, and, in addition to showing such facts, also show that the motive which influenced the defendant in setting the prosecution on foot, was to promote the public good. If the facts within the knowledge of the defendant were such as would have induced a prudent man, acting for the public good, and not influenced by ill-will or malice, to institute the prosecution, then there was probable cause, and if probable cause the defendant can not be held liable, even though he may have been influenced by ill-will. The fact that there was ill-will or malice may, no doubt, be considered in determining whether there was or was not probable cause, but from the fact alone that the prosecution was not undertaken from public motives, want of probable cause can not be inferred as a matter of law. Professor Greenleaf says that "the want of probable cause is a material averment," and that "It is independent of malicious motive, and can not be inferred, as a necessary consequence, from any degree of malice which may be shown." 2 Greenl. Ev., section 454.

As the judgment must be reversed for the error committed in giving the fourth instruction, it is unnecessary to discuss or decide the other questions argued. Judgment reversed.

Filed Dec. 20, 1884.

First National Bank of New Castle *et al.* v. Nugen.

No. 9785.

FIRST NATIONAL BANK OF NEW CASTLE ET AL. v. NUGEN.

PRINCIPAL AND SURETY.—*Subrogation.*—*Pleading.*—*Denial.*—*Set-Off.*—*Harmless Error.*—Suit by a surety against his three principals, alleging that he had with them, and as their surety, executed a note which he had been compelled to pay; that one of the principals had assigned to the creditor, a bank, a decree of foreclosure as collateral security for the same debt, receiving from the creditor a written agreement showing the purpose of the assignment, which agreement had been assigned to the plaintiff. Prayer for personal judgment, and to be subrogated to the rights both of the plaintiff in the decree and of the bank therein. Answer by two of the three principals: 1. General denial. 2. That the assignment to the plaintiff of the written agreement was without consideration. 5. That the principal debtors had delivered to the plaintiff a great and sufficient amount of property to enable the plaintiff to pay this debt and other debts of theirs which he agreed to pay, all which he refused to pay, but converted the property to his own use. 6. An indebtedness of the plaintiff to these two defendants, as a set-off.

Held, that the second defence was bad as an answer to the whole complaint, because it answered only a part.

Held, also, that the matter alleged in the fifth was admissible under the general denial, as tending to show that the plaintiff was not surety but principal debtor, and therefore it was a harmless error to hold it bad on demurrer.

Held, also, that the sixth (set-off) was bad for want of mutuality, inasmuch as one of the principal debtors, a defendant, was not shown to have any interest in the demand pleaded as a set-off.

PROMISSORY NOTE.—*Consideration.*—*Evidence.*—The consideration and terms upon which a note was given and accepted, whether to satisfy a debt or as evidence of it, may be shown by parol.

From the Delaware Circuit Court.

J. H. Mellett, E. H. Bundy and J. Brown, for appellants.

W. Grose and J. M. Morris, for appellee.

NIBLACK, J.—Complaint by Silas R. Nugen against the First National Bank of New Castle, George W. Nugen, Thomas Nugen, John T. Crum, Josiah W. Glidden, George B. Norris, administrator of the estate of Robert Bartlett, deceased, Mary Bartlett, William Bartlett, Julia Ann Bartlett, Minnie Bartlett, Rena Bartlett, Louisa Dearth and John R. Dearth,

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charging that the plaintiff, as surety, and the defendants George W. Nugen, Thomas Nugen and John T. Crum, as principals, had executed to the First National Bank of New Castle, above named, their promissory note in the sum of \$4,000, upon which the bank had afterwards obtained a judgment; that the plaintiff had been compelled to pay and had paid such judgment as the surety therein; that at the time of executing the note, as above, to the bank, the defendant George W. Nugen, as the assignee of certain notes executed by Robert Bartlett, in his lifetime, to the defendant Josiah W. Glidden, and secured by mortgage, had obtained a decree of foreclosure against Norris, as Bartlett's administrator, and the heirs at law of Bartlett; that as security for the payment of said note, the defendant George W. Nugen had assigned said decree of foreclosure to the bank, taking from the bank a written agreement showing the purpose for which the assignment had been made, which written agreement had been assigned to the plaintiff. Wherefore the plaintiff demanded a personal judgment against his co-makers of the note to the bank, and that he be subrogated to all the rights, both of the bank and of the defendant George W. Nugen, in the decree against the administrator and heirs of Bartlett.

George W. Nugen and Thomas Nugen answered together, but separately from the other defendants: *First.* In general denial; *Second.* That the assignment of the written agreement, made by the bank with George W. Nugen concerning the Bartlett decree of foreclosure to the plaintiff, was executed without any consideration whatever; *Third.* That, on the 28th day of April, 1876, the plaintiff agreed to and with said defendants and their co-defendant John T. Crum, and one Pleasant H. Hays, that in consideration they would execute to him their promissory note for \$10,000, and that they, the said George W. Nugen and Thomas Nugen, would execute their promissory note to him for \$14,000, he, the plaintiff, would pay, discharge and take up certain debts and lia-

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bilities held against them, the said George W. Nugen, Thomas Nugen, Crum and Hays, amounting in the aggregate to the sum of \$24,000, and including the \$4,000 note executed to the First National Bank of New Castle, as herein above stated, which agreement, a copy of which was filed, was reduced to writing and signed by the plaintiff; that the parties of the second part respectively executed to the plaintiff two promissory notes, one for \$10,000 and the other for \$14,000, as it was stipulated in such agreement they should do; that, afterwards, on the 19th day of June, 1876, the plaintiff recovered judgments in the circuit court of the United States for the district of Indiana upon said last named promissory notes against the makers thereof respectively, which judgments are still in full force and effect against the defendants therein; that after the rendition of said judgments the plaintiff agreed that if the defendants George W. Nugen and Thomas Nugen would assign to him the agreement made by the bank, referred to in the second paragraph of this answer, and place it in his hands, together with other notes and evidences of indebtedness due to them, to assist him in paying the debts he had agreed to pay, he would enter the amounts he might realize from the assets thus to be placed in his hands as credits upon such judgments; that the plaintiff had, nevertheless, wholly failed to pay any of the debts which he had assumed to take up and discharge, and had also wholly failed to enter any credits upon the judgments lastly above named; *Fourth.* Payment; *Fifth.* That the assignment of the agreement made between the bank and George W. Nugen in reference to the decree against the administrator and heirs of Bartlett to the plaintiff, was by way of security and indemnity to him against any loss he might sustain by reason of his suretyship for them, the said George W. Nugen and Thomas Nugen, and for no other purpose whatsoever; that prior to that time these defendants had turned over to the plaintiff property, credits and effects of the value of \$25,000; that their co-defendant Crum had turned over and delivered to the

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plaintiff property of the value of \$1,500; that the above named Pleasant H. Hays had transferred and delivered to the plaintiff property of the value of \$5,000, all for the purpose of enabling the plaintiff to pay the note to the bank, described in the complaint, and certain other indebtedness which he had assumed to pay for these defendants and the said Crum and Hays; that the plaintiff had failed and refused to pay said bank debt or any of the other debts he had agreed to pay out of the proceeds of such property, credits and effects, but had, on the contrary, converted such property, credits and effects to his own use. *Sixth.* Setting up certain indebtedness held by the defendants George W. Nugen and Thomas Nugen, against the plaintiff, as a set-off against his demand for reimbursement on account of money paid by him as surety for them and the said Crum on the judgment in favor of the bank.

Demurrers were sustained to the second, fifth and sixth paragraphs of the foregoing answer, and after issue joined and hearing the evidence, the court made a general finding for the plaintiff, and decreed accordingly.

We need not inquire whether the issue tendered by the second paragraph of the answer was a material issue, since the paragraph was, in any event, bad for only answering one branch of the complaint while purporting to answer the whole of it. There were many material averments in the complaint which it neither admitted nor denied.

The matters set up as a defence by the fifth paragraph of the answer amounted to an averment that the plaintiff was, at the time he paid the bank judgment, as between himself and the other judgment defendants, the principal debtor, and hence constituted an argumentative denial of the plaintiff's cause of action. The matters thus set up were, consequently, admissible under the general denial. Under such circumstances no injury was inflicted upon any one by the decision of the circuit court sustaining a demurrer to that paragraph. *Pomeroy Rem. and Remedial Rights*, section 674, *et seq.*

Cannon *et al.* v. Helfrick.

The sixth paragraph of the answer was bad for want of mutuality of interest in the demand pleaded as a set-off, as Crum was not included in the issue which that paragraph tendered. Works Pr., section 646.

There was evidence tending to sustain all the material allegations of the complaint. It can not, therefore, be rightfully held that the finding was not sustained by sufficient evidence.

The written agreement described in the third paragraph of the answer was introduced in evidence by the defendants. The plaintiff was, over the objection of the defendants, permitted to testify in rebuttal that he accepted the ten thousand dollar note mentioned in the agreement as a collateral security only to indemnify him for obligations he had assumed by the agreement. It is claimed that the effect of this parol testimony was to vary the terms of the written instrument, and that it was hence erroneously admitted.

The consideration for which a note was given, as well as the terms upon which it was accepted, that is, whether in satisfaction of an indebtedness or only as evidence of its existence, may, ordinarily, be inquired into by parol, and we see nothing in the evidence objected to as above to take it out of that general rule.

The judgment is affirmed, with costs.

Filed Dec. 20, 1884.

No. 11,750.

CANNON ET AL. v. HELFRICK.

MECHANIC'S LIEN.—*Evidence.*—*Supreme Court.*—For an example of evidence regarded by the Supreme Court as "fairly tending" to support a verdict for the enforcement of a mechanic's lien, and sufficient to support it in the Supreme Court, see opinion.

From the Floyd Circuit Court.

J. V. Kelso, for appellants.

J. Herter, for appellee.

FRANKLIN, C.—Appellee sued appellant and others for a bill for lumber, and to enforce a mechanic's lien for its payment.

The issues, in so far as they affected the parties to this appeal, were denial and payment. There was a trial by the court, finding for the plaintiff, and over a motion for a new trial judgment was rendered for the plaintiff for \$58.07. Cannon, the owner of the real estate upon which the improvement was made, has appealed to this court, and assigned as error the overruling of his motion for a new trial. The only reasons stated for a new trial are, that the finding of the court was contrary to law, and not supported by sufficient evidence.

Michael Cannon, appellant, was the owner of the property; his son Thomas lived with him upon the premises, and contracted with appellant Bullock to build an addition to the dwelling-house in which they lived; appellee Helfrick sold the lumber sued for to said contractor, and it was used in building said addition. The son paid \$100 thereon, and the balance, \$58.07, remained unpaid. The contract was made and the lumber furnished in May, 1882.

The 5294th section, R. S. 1881, provides that "this act shall only extend to work done or materials furnished on new buildings, or to a contract entered into with the owner of any building for repairs; * * * and not to any contract made with the tenant." There is no claim that Thomas Cannon was tenant at the time the lumber was furnished. And it is insisted by appellant Michael Cannon that there was an entire failure in the proof to establish the son's agency, and to hold appellant's property liable for payment.

Appellee testified that he sold the lumber to Bullock, who gave him an order on Thomas Cannon for \$100, which he paid; that the bill was showed to Thomas at the time of said payment, who said that it was all right. Did not know whether it was for the old man or the young man. Bullock said that it was for Cannon, and Cannon knew that the bill

had not been fully paid; had seen the old man about the premises.

George Cardwell testified that Michael Cannon and wife in May, 1882, mortgaged the property in dispute to secure a note executed by Thomas Cannon, but did not know what was done with the money for which the note was given.

Michael Cannon testified that he had lived in the cottage house to which the addition was made six or seven years; that in 1882 he was at home of nights, but worked out during the days; he left of mornings before the carpenter came, and the carpenter had left of evenings before he returned. Thomas told him that Bullock was the carpenter; he had nothing to do with the building; supposed his wife and Thomas had it done. Thomas was not a partner, but lived in his family. At the time the mortgage was made he understood that Thomas was to pay for the building with the money and go into business.

Thomas Cannon testified that he was thirty-three years old, lived with his father, made the contract with Bullock for the improvement of his father's house, and paid Bullock in full; paid appellee Helfrick \$100 on Bullock's order; the plaintiff never said anything about any more being due until after he had fully paid Bullock; saw no bill for lumber; supposed the \$100 was all that was due upon the lumber; nothing was said about whether there was anything more due upon the lumber; would have paid it all if he had known there had been any more due; he made the improvements on his own account, and his father had nothing to with the contract; did not make the contract as agent; his father knew nothing about it; he borrowed the money to go into business; went into business and used the money in his business and not in the house. The improvements were made as an accommodation to himself and as a gift to his father. At the time he had a bank account of \$200; that, with the \$500 he borrowed, was all the money he had to pay for the repairs and improvements on his father's house and interest in his

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business; the addition belongs to his father and mother, for he gave it to them. Did not live with them at time of trial.

Bullock's testimony was as to getting the lumber of appellee, using it in the building, and Thomas paying him in full, and that he yet owed the balance to appellee.

The judgment was against Bullock for the claim, and a lien was declared upon the premises for its payment. We think the evidence fairly tends to sustain the finding of the court.

There can be no question about appellant, at the time, knowing all about the improvements being made upon his property, that he made no objections thereto; he can not afterwards accept them as a gift from his son, freed from the lien for their payment.

The case of *Thompson v. Shepard*, 85 Ind. 352, is very similar to the one under consideration, and in which it was held that "Where a married woman, owning a city lot, mortgaged it to raise money to improve it by the erection of a house thereon, the husband taking the money, and, with her knowledge and consent, erecting the building, employing another to plaster it, the necessary inference follows that the husband was either her agent or a contractor to build the house, and in either case the statute gives the plasterer a right to a mechanic's lien, by recording the proper notice."

Prior to the passage of the act of March 6th, 1883, notice by the mechanic or material man to the owner of the property, that he intended to hold a lien upon the property, other than as required to be recorded by the statute, was not necessary in order to create liability. Hence, in this case, the fact that Thomas had fully settled with Bullock, the contractor, without knowing that there was anything further due plaintiff, the lumberman, can be no defence to this action.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed Sept. 18, 1884. Petition for a rehearing overruled Jan. 22, 1885.

McKee *et al.* v. Hungate *et al.*

No. 11,650.

MCKEE ET AL. v. HUNGATE ET AL.

ASSIGNMENT OF ERROR.—A joint assignment of errors must be well taken by all of the appellants who join in the assignment, or else it is not well taken by any and can not be sustained.

SAME.—*Names of Parties.*—Where the names of certain parties to the record appear among the names of the appellants and also of the appellees, but they do not otherwise appear to be appellees, and they brief and submit the case as appellants, they will be deemed appellants in the Supreme Court.

From the Knox Circuit Court.

S. N. Chambers, G. G. Reily and W. C. Niblack, for appellants.

T. R. Cobb, D. H. Cobb and J. C. Adams, for appellees.

BEST, C.—The appellants, John, Alfred and Henry Simpson, brought this action against their co-appellants Robert S. McKee and Edward Branham and the appellees to enforce a lien upon real estate. The appellants McKee and Branham filed a cross complaint also to enforce a lien upon such real estate. Issues were formed, tried, and judgment rendered for the appellees.

The appellants join in an assignment of errors, alleging that "the court erred in overruling the plaintiffs' demurrer to the first paragraph of Elizabeth Hungate's answer;" that it "erred in overruling the plaintiffs' demurrer to the first paragraph of Henry W. Nierste's answer," and that it "erred in its conclusion of law upon the facts found."

These demurrers were filed by the appellants, who instituted the suit, and an exception to the conclusion of law was alone reserved by them. The other appellants did not join in these demurrers, nor was any exception to the conclusion of law taken by them. The assignment of errors, therefore, can not be sustained by them. As the assignment is joint and can not be sustained by two of the appellants, it can not be sustained by any of them. Such an assignment must be well

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taken by all, or else it is not well taken by any. This has frequently been decided. *Eichbredt v. Angerman*, 80 Ind. 208; *Towell v. Hollweg*, 81 Ind. 154; *Feeney v. Mazelin*, 87 Ind. 226.

The names of McKee and Branham also appear among the names of the appellees, but as they do not otherwise appear to be such parties, and as they have submitted and briefed the case as appellants, they must be so regarded notwithstanding the fact that their names thus appear. For the reasons given, the assignment of errors can not be sustained, and the judgment should therefore be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellants' costs.

Filed Nov. 21, 1884. Petition for a rehearing overruled Feb. 14, 1885.

No. 11,817.

BROOKER ET AL. v. SPRAGUE ET AL.

JUDGMENT.—*Lien.—Sheriff's Sale.*—A judgment lien upon lands is not divested by sale and conveyance of the lands, and a purchaser at sheriff's sale upon execution to satisfy the judgment takes title, where it does not appear that the debtor had other property which should have been first exhausted.

From the Superior Court of Marion County.

B. F. Davis, S. A. Forkner, J. H. Ewick and J. S. Harvey,
for appellants.

J. A. Pritchard, for appellees.

BICKNELL, C. C.—This suit was commenced by Lena Brooker against the appellees, to quiet her title to certain real estate. Her complaint alleged that she was the owner of said real estate, and had been its owner ever since March 14th, 1879. This suit was commenced in December, 1880.

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The complaint further alleged that the defendants had caused said real estate to be advertised for sale to satisfy a pretended judgment lien of the defendant Laura Sprague, which was a cloud upon the plaintiff's title. Wherefore, etc.

The defendants' answer was the general denial; and they filed a cross complaint assailing the plaintiff's title; the cross complaint was answered by a general denial, under which, by agreement, all defences to the cross complaint were to be given in evidence. At this stage of the proceedings the plaintiff died, and the appellants, the surviving husband and the father of the deceased, became plaintiffs in her stead, as her only heirs at law.

The cause was tried at a special term of the court in February, 1884, by the court without a jury. At the request of the parties, the court made a special finding of the facts and stated conclusions of law thereon. The special finding was, in substance, as follows:

1. Thomas Brooker, on or about the 15th day of February, 1877, was a single man and the owner of said real estate, and of other real estate, all of which was in said county of Marion.

2. At the date last mentioned, Lena Starl was the wife of Frank Starl, but was not living with him.

3. At about the date last mentioned, said Thomas Brooker and Lena Starl agreed to marry each other. She then had a suit for divorce pending against her said husband, and the marriage agreed upon between her and Brooker was not to take place until after her divorce should be obtained.

4. As a consideration for said contract by said Lena, said Brooker, at the time the contract was made, executed and delivered to her, and she then accepted, a deed in fee simple for the said real estate, duly acknowledged by him.

5. Said Lena obtained her divorce on the 10th day of March, 1877, but her husband was not a resident of Indiana, and had been notified of the suit for divorce by publication only, and by the decree of divorce said Lena was prohibited

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from marrying again within the period of two years after the date of said decree.

6. Notwithstanding said prohibition, said Brooker and said Lena were married to each other on the 25th of March, 1877, in said county of Marion, if under said prohibition they were capable of marriage, and she lived with him as his wife until February, 1883, and then died leaving the said Brooker and her father, Rudolph Goodnecht, her only heirs at law.

7. The deed aforesaid was not put on record, it was lost or mislaid, and could not be found; she had possession of it until its loss; she made no conveyance of said real estate, but held it and claimed title thereto until she died.

8. The value of said real estate, when conveyed as aforesaid to said Lena, was \$3,000, and said Brooker then owned other real estate of the value of \$4,000.

9. When said deed to said Lena was executed as aforesaid, said Brooker was indebted as follows: A judgment in the Marion Circuit Court in favor of Henry. Weber and against said Brooker, dated October 7th, 1871, for \$101.80; a judgment in the same court, dated November 18th, 1876, for \$143, in favor of one Joseph Stemmons against said Brooker; a judgment in the same court, dated March 5th, 1877, for \$120.40, in favor of one — Long against Ross & Lyon, dated March 5th, 1877, on which said Brooker was replevin bail for stay of execution. Said judgments had been assigned for value to the defendant Laura Sprague, and with interest and costs were unpaid, and were liens upon said real estate conveyed to said Lena, and also upon the other real estate of said Brooker, when said conveyance to Lena was executed.

10. Executions were issued on said judgments and were levied by the sheriff of Marion county, upon all the real estate of said Brooker, including that described in the complaint, and the same was advertised to be sold under the execution issued on the judgment in favor of — Long, and on the day of sale, to wit, on December 27th, 1880, said

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sheriff did sell the land mentioned in the complaint to the defendant Laura F. Sprague for \$500, without relief from valuation or appraisement laws, she being the highest and best bidder, and such sale being authorized by the judgment. Said Laura paid to the sheriff said \$500 and took from him a certificate of the sale. The other real estate aforesaid of said Brooker was sold at the same time to other parties by said sheriff.

11. At the time of said sale the property so levied on and sold to said defendant Laura Sprague was worth, with the improvements thereon, \$2,700.

12. On the 21st of December, 1880, said Lena Brooker, then living, notified the defendants that she was the owner in fee simple of said land described in the complaint and afterwards sold to said Laura as aforesaid, and at the said sale, and before the land was offered for sale, she notified the sheriff and the bystanders that she was such owner, and forbade the sheriff to sell, and said Laura and others to bid; but, notwithstanding such notices, the sheriff sold as aforesaid, and said defendant Laura bought as aforesaid, before any of the other real estate levied upon was offered for sale.

13. Prior to said 21st day of December, 1880, the said Laura F. Sprague had no notice that said Lena claimed to own said real estate, or any part of it.

14. Before said 27th of December, 1880, the notary who prepared the deed to said Lena and took the acknowledgment of it in February, 1877, at the request of said Brooker and Lena, made a copy of said lost deed, and said Brooker signed it, and said notary took and certified an acknowledgment thereof. When the first deed was acknowledged said officer was really a notary public; but when he took and certified the acknowledgment of the second deed, he was not a notary public. Said second deed was delivered to said Lena, and on the day of said sheriff's sale, but before the sale it was recorded in the recorder's office of said Marion county, and before it was given to the recorder for record, its date was

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changed by said Lena from March 14th, 1877, the date placed therein by the party who took the acknowledgment, to March 14th, 1876, and her reason for making such change is not satisfactorily explained by the evidence.

15. Said defendant Laura F. Sprague took possession of said real estate immediately after her said purchase, and has ever since held such possession, and there having been no redemption from said sale, she, on the 28th day of December, 1881, received the sheriff's deed for said real estate, which deed was duly recorded, and she has received the rents and profits of said real estate from the date of her said purchase to the present time.

16. On said 27th day of December, 1880, the day of said sale, said Lena Brooker, then living, commenced the present suit.

17. The rental value of the said real estate from the date of the sale to Mrs. Sprague until the present time is \$27 per month, aggregating \$980.

Upon the foregoing facts the following conclusions of law were stated, in substance:

1. Said conveyance by Thomas Brooker to said Lena Starl was subject to the liens of the said judgments mentioned in the finding and existing at the time.

2. Said marriage contract was void and illegal, and said deed, executed and delivered at the time, had no binding force in law, and was and is invalid.

3. Said marriage between said Thomas Brooker and Lena Starl was invalid, having been consummated in contravention of the law and of the order and judgment of the court made in pursuance thereof.

4. The said sale by the sheriff to Mrs. Sprague, and his deed to her, were valid, and by virtue thereof she is now the lawful owner of said real estate.

5. The plaintiffs are not entitled to the relief demanded, but the defendant Laura F. Sprague is entitled to have her title to, and the possession of, the said real estate forever quieted in her as against the plaintiffs.

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To these conclusions of law, and to each of them, the plaintiffs excepted.

Judgment was rendered quieting the title of the defendant Laura F. Sprague, and the judgment also declared that "the pretended copy of a deed executed by Thomas Brooker to Lena Starl, pretending to convey to her the above described real estate, bearing date March 14th, 1876, be set aside and held for naught." From this judgment the plaintiffs appealed to the superior court in general term. There was no objection made to the form of the judgment, and no motion was made to correct or modify it.

In the general term the appellants' assignment of errors contained three specifications, but the substance of all of them is that the court erred in each of its conclusions of law. The court in general term affirmed the judgment of the court in special term.

The plaintiffs appealed to this court. The error assigned here is that the superior court in general term erred in affirming the judgment of the court in special term. The second and third conclusions of law need not be considered, because, under the special findings, the judgment of the court and the other conclusions of law are right, whether the marriage contract, and the deed made in consideration thereof, and the marriage itself, are void or valid.

The special findings show that the original deed under which the appellants claim, and the alleged copy of it, were executed long after the rendition of all the judgments held by Laura Sprague; her judgments, therefore, were valid liens upon all the land, and the sale to her by the sheriff of the land in controversy was a valid sale. The findings do not show that there was any other property of the judgment debtor which ought to have been sold before the land in controversy was sold, and the action of the said Lena Brooker at the sale, and a few days before the sale, in claiming that she was the owner of the land and forbidding the

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sale, amounted to nothing. The superior court in general term committed no error in affirming the judgment of said court in special term.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellants.

Filed Oct. 18, 1884. Petition for a rehearing overruled Jan. 22, 1885.

No. 11,382.

PITCHER v. DOVE.

QUIETING TITLE.—*Complaint.*—*Description of Lands.*—A complaint to quiet title, describing the land thus, “commencing at the northeast corner of section” (giving number, town, and range), “thence south about 100 rods to a stone established by the county surveyor, thence west 24 rods, thence south 4 rods, thence west 56 rods to middle dividing line of northeast quarter of said section, thence north on said line to the north line of said section, thence east to the place of beginning,” gives a definite description.

SAME.—*Deed.*—*Evidence.*—*Estoppel.*—A deed of lands describing the first line as running from the same initial point “south one hundred rods,” and otherwise corresponding with the complaint, shows no title beyond the distance of 100 rods; but if the stone mentioned in the complaint be still farther south, and the plaintiffs, ignorant of the matter, have been induced to purchase, by a device of the defendant who had knowledge, relying upon his representations that the first line of the tract extended south to the stone, the latter will be estopped in equity to dispute the fact.

SAME.—In such case parol evidence is admissible to establish the facts which create an estoppel.

REAL ESTATE.—*Title.*—*Acquisition by Estoppel.*—Title to land may be acquired by an estoppel in pais.

TAX DEED.—Where it is not shown that the person bound for taxes has no personal property, a tax deed will not convey title.

From the Hancock Circuit Court.

W. H. Martin and T. S. Rollins, for appellant.

J. A. New and J. W. Jones, for appellee.

99	175
130	116
99	175
131	204
99	175
144	55
99	175
1167	170

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ELLIOTT, J.—The complaint of the appellee asserts title to a tract of land described as follows: "Commencing at the northeast corner of section twenty, township fifteen north, of range six east; thence south, about one hundred rods, to a stone established by the county surveyor; thence west twenty-four rods; thence south four rods; thence west fifty-six rods to middle dividing line of northeast quarter of section twenty; thence north on said line to the north line of said section; thence east to the place of beginning." This description is a definite one and confines the claim of the appellee to the property thus specifically described. He is entitled to quiet title to the land he has described in his complaint, but not to some other tract. The issue made by his complaint was as to his title to this particular land, and he can not, as the complaint is framed, recover for any other land than that covered by the description given in his pleading.

The principal questions in the case are, whether the appellee proved title to the land described, and also proved that the appellant was asserting without right some title to it adverse to the appellee. *Second Nat'l Bank v. Corey*, 94 Ind. 457.

Where there is a conflict in the evidence, this court must act upon that which the jury and the trial court accepted as creditable and satisfactory, without weighing it to discover whether it was or was not the weightier. *Arnold v. Wilt*, 86 Ind. 367; *Cain v. Goda*, 94 Ind. 555.

In this case we must, under this well established rule, accept as true the evidence adduced by the appellee and ascertain whether it supports his complaint.

The claim of title is founded in part on a sheriff's deed and on a tax deed. The first of these deeds is based on a decree of foreclosure, and, as the claimant showed a judgment, sale and title in the judgment defendant, he made a case entitling him to the land described in that deed. That this deed did convey a title to the land described in it is clear enough; the difficult question is whether it covers all the land claimed. It is obvious that a sheriff's deed can not confer title to land

not embraced in the description, and here the question is whether it did embrace all the land now claimed; that it did include part of it is not disputed, the dispute is whether it embraces a strip of land lying more than one hundred rods south of the northeast corner of section twenty, in township fifteen. The complaint describes the line as running south to a stone established by the county surveyor; while the sheriff's deed describes the line as running south on the section line "one hundred rods." It seems quite clear that this latter description does not include land lying south of a point one hundred rods south of the northeast corner of section twenty. There is no ambiguity in the language, and it is clearly expressed that the south boundary line of the tract conveyed by the sheriff is one hundred rods distant from that corner. If a visible monument had been given in that deed, as it is in the description in the complaint, namely, a stone established by the surveyor, it would have controlled, for visible monuments control courses and distances. We can see no escape from the conclusion that the sheriff's deed conveyed land only for a distance of one hundred rods south of the place of beginning.

The tax deed was not sufficient to convey title, because it was not shown that the person bound for the taxes had no personal property. *Johnson v. Briscoe*, 92 Ind. 367; *Keeper v. Force*, 86 Ind. 81; *Woolen v. Rockefeller*, 81 Ind. 208; *Smith v. Kyler*, 74 Ind. 575; *Ward v. Montgomery*, 57 Ind. 276.

Neither of the deeds, nor both combined, vested title in the appellee to the strip of land in dispute. There was, as the evidence shows, no claim asserted by the appellant to the land embraced in the sheriff's deed, and for this reason no case made against him on that deed. It appears very clearly that if the appellee has a cause of action, it must rest on some other foundation.

The appellee's counsel place the right to the relief sought on the ground of estoppel. Our cases hold that title may be

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acquired by estoppel, and, while there is much diversity of opinion upon this point, we are satisfied that they rest on a solid foundation, and are well sustained by authority. *Ellis v. Diddy*, 1 Ind. 561; *Barnes v. McKay*, 7 Ind. 301; *Junction R. R. Co. v. Harpold*, 19 Ind. 347; *Maxwell v. Campbell*, 45 Ind. 360; *Burt v. Bowles*, 69 Ind. 1; *Anderson v. Hubble*, 93 Ind. 570 (47 Am. R. 394); *Wire v. Wyman*, 93 Ind. 392; *Pep-per v. Zahnsinger*, 94 Ind. 88; *Karnes v. Wingate*, 94 Ind. 594; 19 Cent. L. J. 87, 90, and authorities cited in notes. Our ruling is that title may be acquired by estoppel.

What facts will constitute an estoppel sufficient to confer title is the next question encountered. It is well settled that there need not be any design to defraud in order to constitute an estoppel. It is sufficient if the conduct of the party has been knowingly such as would make it unconscionable on his part to deny what his conduct had induced another to believe and act upon in good faith and without knowledge of the facts. *Anderson v. Hubble*, *supra*.

In order to constitute an equitable estoppel, it must appear that one party has induced the other to act, and that there was knowledge on the one part and ignorance on the other. *Fletcher v. Holmes*, 25 Ind. 458; *Lash v. Rendell*, 72 Ind. 475; *Robbins v. Magee*, 76 Ind. 381, and auth. cited; *Sims v. City of Frankfort*, 79 Ind. 447; *Buck v. Milford*, 90 Ind. 291; *Mitchell v. Fisher*, 94 Ind. 108.

We proceed to an examination of the evidence to ascertain whether it proves an estoppel under these rules, and, guided by the rule heretofore stated, we must accept that adduced on the part of the appellee.

On the witness stand the appellee testified that he had lived on the land before he bought it at the sheriff's sale; that during that time he and the appellant traced the lines a half dozen times, and the latter pointed out the corners, and advised the purchase of the land; that the stone mentioned in the description in the complaint was pointed out to him by Pitcher, and identified as the corner. At the time mentioned

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in the appellee's testimony the fence was along the line indicated by the corner, and has since been moved by the appellant. In the course of his testimony the appellee said: "He," the appellant, "said the fence was on the line before I bought it; I don't know anything about the thing; I took his word for it; the fence was there, and he said it was on the line." And the appellee also testified that he did not know where the corners were, but relied on the statements of the appellant. There was other evidence tending to prove that the line had been established by former owners, and that this was known to the appellant and acquiesced in by him. We think this evidence fully sustains the finding of the court, for it proves knowledge, and means of knowledge, on the part of the appellant, want of knowledge on the part of the appellee, and a purchase by the latter on the faith of the representations of the former. A case is established under the rules of law applicable to boundaries as well as under the strictest rules of estoppel. *Browne Stat. Frauds* (3d ed.), section 75; *Wingler v. Simpson*, 93 Ind. 201. The proposition of the appellant that he is not bound by the boundary line because no consideration was paid him can not be sustained, for at least two reasons, one, his own representations concluded him from averring that the line was not the true one; the other is, the purchase by the appellee, although it was of no benefit to the appellant, was a consideration. *Shade v. Creviston*, 93 Ind. 591. It is not necessary that a benefit should accrue to the promisor; it is sufficient if there is some detriment to the promisee.

There was no error in permitting the parol evidence upon the subject of the boundary of the land. It was proper to prove acts done in fixing the boundaries, and when acts are competent, so, also, are declarations accompanying them. *Creighton v. Hoppis*, *post*, p. 369.

Proof of an equitable title was sufficient to sustain the cause of action stated in the complaint. *Burt v. Bowles*, 69 Ind. 1; *Steeple v. Downing*, 60 Ind. 478; *Barnes v. Union School Tp.*, 91 Ind. 301. If the appellant had desired a more

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specific statement of the title claimed by the appellee, he should have moved to make the complaint more specific. *Schenck v. Kelley*, 88 Ind. 444; *Collins v. McDuffie*, 89 Ind. 562; *Brown v. Ogg*, 85 Ind. 234.

Judgment affirmed.

Filed Dec. 10, 1884. Petition for a rehearing overruled Feb. 20, 1885.

 No. 11,002.

LESLIE v. MERRICK ET AL.

MORTGAGE.—*Description of Lands.*—*Complaint.*—*Foreclosure.*—A mortgage of lands described as "all the lands owned by the mortgagor" can be made certain by evidence *aliunde*, and therefore is not void; and a complaint to foreclose, describing the lands specifically, and averring that these were all the lands owned by the mortgagor, is, in that respect, sufficient.

PRACTICE.—*New Trial.*—*Waiver.*—*Special Finding.*—*Verdict.*—A motion for a new trial is not a waiver of a motion for judgment on facts specially found in answer to interrogatories, notwithstanding the general verdict.

- **MORTGAGE.**—*Execution.*—*Fraud.*—One who, being illiterate, executes a mortgage without knowledge of its contents, no fraud being shown, can not contest its validity on that ground, nor can his grantee who purchases with knowledge of the mortgage.

From the Pike Circuit Court.

J. E. McCullough and *J. W. Wilson*, for appellant.

E. A. Ely and *F. B. Posey*, for appellees.

HAMMOND, J.—Suit by appellant against appellees upon a note and mortgage executed by the appellee McKnight, and his wife Mary Jane McKnight, to the appellant. The note and mortgage were given May 1st, 1869, to secure the payment of \$950, payable one year after date, with interest at ten per cent., and attorney's fees, and waiving the benefit of appraisal laws. It is alleged that the mortgage was recorded May 15th, 1869. Two tracts of land are attempted to be described in the mortgage; one as containing sixty-seven acres, which was owned by McKnight and his wife at the time of

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the execution of the mortgage; and the other as containing sixty-one acres, which was owned by the wife at the time named. • Averments are made in the complaint to the effect that the lands thus attempted to be described were the only real estate owned by the mortgagors, or either of them, when the mortgage was given. The complaint avers that McKnight and wife, after the execution of the mortgage, conveyed the tract of sixty-one acres to the appellee Merrick, "who, at the time he accepted said conveyance, well knew of the existence of said mortgage, and of the real estate thereby mortgaged and intended to be mortgaged, and he accepted said conveyance subject to said mortgage, and, in part consideration for said conveyance, he assumed the payment of said mortgage." The complaint also alleges "that the said defendant William L. Merrick also claims to have some interest in the tract of land hereinbefore first described, and averred to belong to said John and Mary Jane McKnight, but plaintiff avers that in truth the said Merrick has no interest therein whatever, and he is made a party herein to answer (as to) what interest he claims." The death of Mary J. McKnight, after the execution of the mortgage, is alleged, as is also the subsequent death of her daughter and only child, who died without issue, but leaving surviving her husband, the appellee Fillmore Jerauld.

There were allegations in the complaint made for the purpose of having the mortgage reformed on account of supposed mistakes in the descriptions of the real estate; but the view we take of the case renders the consideration of this branch of it unimportant.

The defendants, except Merrick, made default. After demurring unsuccessfully to the complaint on the ground that it did not state facts sufficient to constitute a cause of action against him, he answered in nine paragraphs, substantially as follows:

1. By the general denial.
2. Admitting the execution of the note and mortgage by Mc-

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Knight and wife; denying the defendant's assumption of its payment; and alleging that the note and mortgage were given for \$950, the supposed indebtedness of McKnight to the appellant, when, in fact, such indebtedness amounted to only \$400.

3. Want of consideration for the note and mortgage.

4. Claiming that the defendant owned the sixty-seven acres of land in controversy; that the same was conveyed to him by parties other than McKnight and wife, and that neither McKnight nor his wife ever had any title thereto.

5. That the tract of sixty-one acres was the separate property of McKnight's wife; that the mortgage as to her was without consideration; that after the execution of the mortgage McKnight and his wife conveyed this land to the defendant for the sum of \$1,500, and that since such conveyance McKnight and his wife have been insolvent.

6. Not materially different from the fifth.

7. Payment.

8. That the sixty-one acres belonged to McKnight's wife who could not read or write; that she was, by the plaintiff's fraud, induced to execute the mortgage under the belief that it did not include the sixty-one acres, and that it was given to secure only the sum of \$400.

9. Set-off for money had and received by the plaintiff from McKnight.

The second, fourth, fifth, sixth and eighth paragraphs of answer purported to answer the complaint only partially.

No demurrer was filed to the answer, and while the sufficiency of the several paragraphs need not be considered, it may be observed that the fifth and sixth are manifestly bad, as, at the time of the execution of the mortgage, there was no inhibition in the law against a married woman joining with her husband in a mortgage upon her own real estate to secure the payment of a debt due from him. *Hubble v. Wright*, 23 Ind. 322. The appellant replied to the answer:

1. By the general denial.

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2. Payment as to the ninth paragraph of the answer.

3. Former adjudication, resulting adversely to the defendant, as to the second, third, fourth, fifth, seventh, eighth and ninth paragraphs of his answer.

There was a trial by jury who returned a general verdict for Merrick, with answers to interrogatories, which had been submitted by the court at the request of the parties. Appellant moved for judgment in his favor on the special findings, notwithstanding the general verdict, and also for a new trial. The cause was continued for the term without disposing of either motion. The court at the next term overruled the motion for a new trial, to which appellant excepted, and then renewed his motion for judgment on the special findings, which was also overruled, and an exception was reserved to the ruling. Judgment was then rendered in favor of Merrick for costs.

The rulings upon the appellant's motions for a new trial and for judgment upon the special findings are assigned for error.

The appellee Merrick assigns as cross error the overruling of his demurrer to the complaint. The question presented by the assignment of such cross error will be first considered.

It is objected to the complaint that the mortgage is void for want of sufficient description of the real estate. The mortgage describes the land as being in Pike county, this State. The mortgagors are also mentioned in the mortgage as being residents of that county. A description of the sixty-seven acres is attempted in the mortgage by giving a place of beginning, courses and distances, and referring to visible monuments; but the description thus attempted is, perhaps, too uncertain to answer any practical purpose as a means, by itself, of identifying said sixty-seven acres. Immediately following the imperfect description of the sixty-seven acres the following language occurs respecting the sixty-one acres: "Also 61 acres, including the dwelling-house, a part of survey No. 13, town. 1 north, range 9 west." This description of

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the sixty-one acres is obviously insufficient. But following it there occurs in the mortgage the following general description of all the real estate mortgaged, and evidently intended to cure the imperfections in the previous descriptions: "That it [is] intended to mortgage all the land of John and Jane McKnight except a — conveyed to Goodlet Morgan."

Here, then, we have in the mortgage two tracts of land referred to, one containing sixty-seven acres and the other sixty-one acres, and both in Pike county, Indiana, as being all the real estate owned by the mortgagors. The complaint describes two tracts of land, respectively containing the number of acres mentioned, and avers that the same were the only real estate owned by the mortgagors at the time the mortgage was given. We think that the descriptions in the mortgage were such as might properly be aided by the averments of the complaint, and, as thus aided, might be established by extrinsic evidence. That is certain which can be rendered certain. A deed or mortgage of all the real estate of the grantor or mortgagor is good without any further description, because the real estate conveyed or mortgaged can be ascertained by evidence *aliunde*. *Parker v. Teas*, 79 Ind. 235; *Wilson v. Boyce*, 92 U. S. 320; 1 Jones Mort., section 65. In *English v. Roche*, 6 Ind. 62, it was said: "The description is sufficient whenever the land intended to be mortgaged can be ascertained by it."

It was plain by the mortgage that McKnight and his wife intended to mortgage a tract of sixty-seven acres and also a tract of sixty-one acres—all the land owned by them in Pike county. Supposing that they owned two such tracts of land in that county, and no other land, the real estate mortgaged could easily be ascertained. The averments of the complaint come to the assistance of the mortgage, by definitely describing the two tracts of land, averring that they were owned by the mortgagors when the mortgage was executed, and that they then owned no other real estate. There was no error in overruling the demurrer to the complaint.

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We will next consider the alleged error of overruling appellant's motion for judgment upon the special findings.

Appellee insists, however, that no question upon this ruling is before us. His position is that the appellant, by moving for a new trial before there was a ruling upon his motion for judgment on the special findings, waived his motion for such judgment. *Dickson v. Rose*, 87 Ind. 103, is cited as supporting this view. In that case the court had stated its conclusions of law upon facts specially found, to which no exception was taken until after the party complaining of such conclusions had filed his motion for a new trial. It was held that the exception came too late, not having been taken at the time the decision was made as required by section 625, R. S. 1881. But in the present case the exception was taken to the overruling of the motion for judgment on the special findings as soon as it was made. This ruling was not announced until after the ruling on the motion for a new trial. A motion for judgment on the special findings, notwithstanding the general verdict, does not waive the right to afterward move for a new trial. *Brannon v. May*, 42 Ind. 92; *Indianapolis, etc., R. R. Co. v. McCaffrey*, 62 Ind. 552; *Ronan v. Meyer*, 84 Ind. 390. Nor do we think that a motion for a new trial precludes a subsequent motion for judgment upon the special findings. It was said, in *Brannon v. May*, *supra*: "The doctrine that a motion in arrest of judgment cuts off a motion for a new trial, though well settled in this State, is somewhat technical, and we are not disposed to extend it to cases of motions like that under consideration."

The record, we think, properly presents the correctness of the ruling in question.

We make the following summary of facts specially found by the jury in answer to interrogatories:

McKnight and wife executed the note and mortgage as alleged in the complaint to secure the purchase-money of the tract of sixty-seven acres, which had been conveyed by the appellant to the mortgagors. No part of the debt secured

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by the mortgage was ever paid. Appellant was not indebted to McKnight, in any amount, for money received from the latter. A reasonable attorney's fee for foreclosing the mortgage was ten per cent. on the first \$500 of the debt, five per cent. on the next \$500, and two and one-half per cent. on the excess over \$1,000. At the time of executing the mortgage McKnight and his wife owned the sixty-seven acres of land as described in the complaint, and the wife owned the sixty-one acres as therein described, and these were all the lands then owned by them. Appellant did not procure McKnight's wife to execute the mortgage by representing that the debt secured by it was only \$400, nor by representing that her land was not embraced in it. The mortgage was recorded May 15th, 1869. After its execution, but before it was recorded, appellee Merrick purchased the sixty-one acres, but did so with actual knowledge of the existence of the mortgage. He also had a deed for the sixty-seven acres, which was executed by Catherine and William McKew on April 14th, 1870, which was after the recording of the mortgage.

The facts specially found fully sustain the material averments of the complaint, and are clearly against the appellee Merrick upon the special defences set up in his answer. The mortgage was duly executed and recorded; the debt secured by it remains unpaid; there was no fraud in the procurement of the mortgage; no set-off against the debt; and all the claim that Merrick has to the real estate is subject to the mortgage. The special findings of fact by the jury in answer to interrogatories are inconsistent with their general verdict. In such case the special findings must control the general verdict, and judgment should be rendered accordingly. Section 547, R. S. 1881; 1 Works Pr., section 861.

In addition to the facts above stated as found by the jury, they also found that McKnight's wife, when she executed the mortgage, could not read or write; that the mortgage was not read or explained to her, and that she did not know its con-

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tents. They also found that she agreed to mortgage the sixty-seven acres owned by her and her husband, but the finding is silent as to whether she agreed to mortgage the sixty-one acres owned by herself. The above facts do not show that she was induced, by the fraud of any one, to execute the mortgage. As to the fraud charged against the appellant in Merrick's answer, the jury in effect found that it had no existence. Mrs. McKnight, as the jury found, executed the mortgage with her husband. It follows that she knew the instrument she was executing was a mortgage. If she did not go to the trouble of informing herself of its contents, and there was no fraud practiced upon her, as it seems there was not, she could not herself have had any defence on account of her *laches*, and, certainly, a subsequent grantee, who purchased with full knowledge of the mortgage, would be in no better situation to contest its validity. As it is not shown that Mrs. McKnight's execution of the mortgage was procured by fraud, neither she nor her grantee could defend on the ground of her illiteracy, and that she executed the mortgage in ignorance of its contents. *Montgomery v. Scott*, 9 S. C. 20 (30 Am. R. 1). Our statute provides that where a deed is signed with a mark, or where the officer before whom it is acknowledged has good cause to believe that the contents and purport of the deed are not fully known to the grantor, it is the duty of such officer to explain to the grantor the contents and purport of the deed, but the same statute also provides that the officer's failure to discharge his duty in this respect shall not affect the validity of the deed. Section 2948, R. S. 1881.

There was error in overruling the appellant's motion for judgment upon the special findings.

Reversed, at the costs of the appellee Merrick, with instructions to the court below to sustain appellant's said motion for judgment on the special findings, and to render a decree for the foreclosure of the mortgage for the amount, prin-

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cial and interest of the debt, with attorney's fees, as found by the jury, and for such of his costs as appellant may be entitled to recover.

NIBLACK, J., did not participate in the decision of this case.

Filed Dec. 12, 1884. Petition for a rehearing overruled Feb. 13, 1885.

No. 11,408.

NORDYKE & MARMON COMPANY v. VAN SANT.

DEMURRER TO EVIDENCE.—Where the plaintiff's evidence tended to show every material fact necessary to his recovery, and from it the jury might properly have found a verdict in his favor, a demurrer by the defendant to such evidence should be overruled.

NEGLIGENCE.—*Employer and Employee*.—An employer is liable to an employee for a personal injury resulting from a failure to provide proper machinery or from the employment of incompetent servants.

From the Superior Court of Marion County.

J. T. Dye and *W. P. Fishback*, for appellants.

R. Hill and *W. H. Martz*, for appellee.

BICKNELL, C. C.—The appellee brought this suit against the appellant, a corporation operating a machine shop and foundry, to recover damages for injuries sustained by the appellee while a day laborer in the employment of the appellant.

The complaint averred, in substance, that the plaintiff was employed to aid his fellow-workmen and do other work about the defendant's shop, a part of which work was to help move heavy iron shafts on and off and about a certain lathe planer; that while the plaintiff was assisting to move a shaft from said lathe planer, the shaft fell and broke his arm in three places and disabled him for life; that these injuries were sustained without any fault of the plaintiff, and were caused by the carelessness and negligence of the defendants in placing their lathe planer in an unsafe and dangerous position, and in

99	188
127	150
99	188
130	349
99	188
135	409
135	685

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employing an ignorant and incompetent person to manage the handling of it, and in failing to provide proper machinery to move such heavy shafts on and off said lathe planer.

The defendant answered by a general denial. The cause was submitted to a jury, and after the plaintiff's evidence was heard the defendant demurred to it. The court in special term overruled the demurrer to the evidence, a jury assessed the plaintiff's damages at \$800, and judgment was rendered therefor. The defendant appealed to the superior court in general term, assigning as error that the court in special term erred in overruling the defendant's demurrer to the evidence. The court in general term affirmed the judgment of the court in special term. The defendant appealed to this court; he assigns as error here, that the superior court in general term erred in affirming the judgment of the court in special term.

When the defendant demurs to the plaintiff's evidence, the demurrer ought to be overruled, if from the evidence the jury might have properly found a verdict for the plaintiff. *Stanford v. Davis*, 54 Ind. 45.

On a demurrer to evidence, everything will be taken against the party demurring which the evidence tends to prove, including every fair inference deducible therefrom. *Pinnell v. Stringer*, 59 Ind. 555; *Atherton v. Sugar Creek, etc., Co.*, 67 Ind. 334; *Willcuts v. Northwestern M. L. Ins. Co.*, 81 Ind. 300; *Ruff v. Ruff*, 85 Ind. 431; *Kincaid v. Nicely*, 90 Ind. 403; *Bethell v. Bethell*, 92 Ind. 318.

In this case there was evidence tending to show that the appellant did not provide proper machinery and appliances for moving such a heavy shaft, and there was also evidence tending to show that the person in charge of the moving of the shaft was incompetent, and that the plaintiff, without any fault of his, was injured by reason of the negligence of the defendant, in failing to provide such machinery, and in employing such incompetent person, under whose direction it was the duty of the plaintiff to act.

In such cases the employer may be liable. *Thayer v. St.*

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Louis, etc., R. R. Co., 22 Ind. 26; *Chicago, etc., R. W. Co. v. Harney*, 28 Ind. 28; *Ohio, etc., R. W. Co. v. Collarn*, 73 Ind. 261 (38 Am. R. 134); *Columbus, etc., R. W. Co. v. Arnold*, 31 Ind. 174; *Indiana, etc., Co. v. Millican*, 87 Ind. 87; *Rogers v. Overton*, 87 Ind. 410; *Boyce v. Fitzpatrick*, 80 Ind. 526.

There was evidence tending to show every material fact necessary to the plaintiff's recovery.

The superior court in general term did not err in affirming the judgment of the court in special term. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed Nov. 21, 1884. Petition for a rehearing overruled Jan. 23, 1885.

No. 10,423.

SHIMER v. MANN.

WILLS.—*Construction.—Rule in Shelley's Case.*—A devise of the rents and profits of lands to M. until his youngest child shall become of age, "upon the happening of which event the fee simple of said lands shall then vest absolutely in said M. and his heirs, and may by him or them be disposed of as he or they may judge best for his or their interest," vests in M. an estate in fee simple when his youngest child reaches full age, there being nothing in the context or situation of the parties plainly indicating a different intention.

SAME.—*Changing Words.*—It is only in the clearest cases that courts will undertake to substitute or change the words of a will.

SAME.—*Effect of term "Heirs."*—When the term "heirs" clearly appears to be used as descriptive of a class who are to take as devisees, the fee will not vest in the first taker, but where the word is connected with the name of the first taker, it carries the fee, unless it clearly appears that it was not used in its ordinary legal signification.

From the Superior Court of Marion County.

A. C. Ayres, E. A. Brown and E. C. Buskirk, for appellant.
G. W. Spahr and P. W. Smith, for appellee.

99	190
124	373
126	90
127	349
99	190
131	127
131	208
131	384
99	190
134	445
136	386
99	190
137	416
138	611
99	190
141	176
143	284
99	190
147	97
99	190
160	190
160	121

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ELLIOTT, J.—On the 12th day of May, 1856, Lydia Lathan executed her last will, containing these provisions:

“Item: I give, devise and bequeath to my late husband’s nephew, Samuel B. Mann, all my personal estate, except my family Bible, which I give and bequeath to my niece, Martha Bane.

“Item: I give and bequeath to the said Samuel B. Mann the rents and profits of twenty (20) acres of land situate, lying and being in Warren township, Marion county, Indiana, near and adjoining to the lands of Esquire Shimer, until the youngest child of the said Samuel B. Mann shall become of age, upon the happening of which event it is my will and pleasure that the fee simple of said land shall then vest absolutely in the said Samuel B. Mann and his heirs, and may by him or them be disposed of as he or they may judge best for his or their interest.”

The Samuel B. Mann named in the will was the nephew of the testatrix, and, at the time the will was executed, had three children living, Loren, James and Harvey L. Mann. Lydia Lathan died on the 13th day of June, 1857, and at the time of her death her nephew and devisee had no other children than those named. Of these the appellee was the youngest. In February, 1865, Samuel B. and Loren Mann united in a warranty deed purporting to convey the land to the appellant. The appellee arrived at full age in August, 1873, and instituted this suit for partition, claiming an undivided one-third of the land.

The right of the appellee to maintain his claim depends upon the construction of the will of Lydia Lathan. The ruling question in the case, shortly stated, is this: Does the will devise to Samuel B. Mann an estate in fee vesting absolutely when his youngest child attains full age, or does it vest the fee jointly in him and his children living at the time of the death of the testatrix?

Where a deed or a will uses the word “heirs,” and uses it in its ordinary legal signification, a fee is vested in the first

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taker. This is the effect and force of the rule in *Shelley's Case*, 1 Co. 88, and that rule enters into our law as a rule of property. *Sorden v. Gatewood*, 1 Ind. 107; *Doe v. Jackman*, 5 Ind. 283; *Siceloff v. Redman*, 26 Ind. 251; *McCray v. Lipp*, 35 Ind. 116; *Andrews v. Spurlin*, 35 Ind. 262; *Gonzales v. Barton*, 45 Ind. 295; *Maxwell v. Featherston*, 83 Ind. 339. If the will under discussion is governed by that rule, Samuel B. Mann, the first taker, took an estate in fee. Whether the will is or is not governed by that rule depends upon the answer to the question whether there is anything in the situation of the parties, or in the context of the instrument, plainly indicating an intention to assign to the words of limitation a meaning different from their ordinary legal signification.

There is a material difference between deeds and wills, and much more liberality is exercised in the construction of the latter instruments than in the former, for, where a will is presented for construction, the chief effort of the courts is to discover and carry into execution the intention of its author, and to this end minor considerations are subordinated. *Brooks v. Evetts*, 33 Texas, 732. But, while this is true, it also true, that where words of definite legal meaning are employed, they will be assigned that meaning, unless the context of the instrument makes it plain that the testator employed them in a different sense.

In *Nelson v. Davis*, 35 Ind. 474, the court quoted the statement of Chancellor WALWORTH, made in *Schoonmaker v. Sheely*, 3 Denio, 485, that "The word children, in its primary or natural sense, is always a word of purchase, and not a word of limitation; and the word issue is very frequently a word of purchase also. But heirs, and heirs of the body, are in their primary and natural sense words of limitation, and not of purchase." The definition adopted by the Chancellor is one that has long been recognized and accepted by the courts, and the strictness with which they have adhered to this definition has exercised a potent influence upon the disposition of lands by deeds and wills. 2 Redf. Wills, 67; 3 Jarman Wills (5

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Am. ed.) 115. The word "heirs" written in a deed or will is one of great power, and its force is not impaired by the mere use of negating or restraining words. Fearne expresses this doctrine in very strong words, for he declares that "the most positive direction" will not defeat the operation of the rule in *Shelley's Case*. 2 Fearne Remainders, section 453. It may be that this statement of the law is somewhat too strong under the doctrine of later cases, but certainly the law is that mere negating words can not restrain or impair the force of the word "heirs." 3 Jarman Wills (5 Am. ed.) 115.

We have no doubt that the word "heirs" may be construed to mean children where it is plain that the testator employed it in that sense. *Ridgeway v. Lanphear*, post, p. 251; *Hull v. Beals*, 23 Ind. 25; *Star Glass Co. v. Morey*, 108 Mass. 570; *Scott v. Guernsey*, 48 N. Y. 106; *Urich's Appeal*, 86 Pa. St. 386; S. C., 27 Am. R. 707; *King v. Beck*, 15 Ohio, 559; *Guthrie's Appeal*, 37 Pa. St. 9; *Jordan v. Adams*, 9 C. B. (N. S.) 483; *North v. Martin*, 6 Sim. 266. While it is true that the word "heirs" may be explained to mean children, it is also true that this meaning can not be assigned to the word unless it very clearly appears that it was employed by the testator in that sense. The courts have used very strong language upon this subject. In one case Lord REDESDALE said: "The rule is, that the technical words shall have their legal effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise." *Jesson v. Wright*, 2 Bligh (H. L. Cas.) 1, 56. Stronger still is the statement of Lord DENMAN, who said: "Technical words, or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense." *Doe v. Gallini*, 5 Barn. & Adol. 621. Redfield says: "Conjecture, doubt, or even equilibrium of ap-

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parent intention, will not suffice." 2 Redf. Wills (2 ed.) 67; *Guthrie's Appeal*, *supra*; *Jordan v. Adams*, *supra*; *Poole v. Poole*, 3 B. & P. 620; *Doebler's Appeal*, 64 Pa. St. 9.

The language employed by the testatrix in the final clause of the last item of the will is, "upon the happening of which event it is my will and pleasure that the fee simple of said land shall then vest absolutely in the said Samuel B. Mann and his heirs, and may by him or them be disposed of as he or they may judge best for his or their interest," and this clause certainly does not evince an intention to use the word "heirs" as meaning children; so far, indeed, is it from doing this that it does the exact opposite, for it in terms vests a fee in Mann and his heirs and declares that he may dispose of the estate, or that his heirs may do so. If we ascribe to this language its usual force and effect, we are carried to the conclusion that the testatrix intended, that upon the happening of the designated event Samuel B. Mann should be invested with an absolute power of disposition, but that if he died without exercising this right, then his heirs should be invested with it, and this conclusion makes it apparent that the word "heirs" was employed in its technical sense. The right of disposition is first vested in Samuel B. Mann, and this is in exact agreement with the technical import of the term "heirs," as well as with the phrase, "the fee simple of said land shall then vest absolutely in the said Samuel B. Mann and his heirs." The language employed in describing the power of alienation does not import a joint power, but a several one; for the disjunctive form of the conjunction is used, and the effect is to declare that either may dispose of the estate, postponing, however, the rights of those who may become heirs to those of the person first named. As Mann could have no heirs during his life, the power of disposition was first and fully in him as the first taker, and in his heirs only upon his decease, and, without any express provision to that effect, this would have been the force of the words "fee

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simple" as well as of the word "heirs." 1 Preston Estates, 71, 72, 73.

Superadded words, which merely describe or specify the incidents of the estate created by such a word of limitation as "heirs," do not cut down the interest of the devisee. If we regard as explanatory the words which follow the term "his heirs" in the will under examination, then, unless we wrench them from their natural meaning, we must treat them as more specifically describing the duration of the estate devised, for these words do not detract from the force of the word "heirs," but, if that be possible, add to its force, because they describe an absolute power of alienation, which is one of the chief incidents of the estate which the use of the word "heirs" operates to create. It may not have been necessary to describe a power incident to the estate created, but that an unnecessary thing was done can not break the force of what the books often say is "a powerful word." "The proper and technical mode of limiting an estate in fee simple," says Mr. Jarman, "is to give the property to the devisee and his heirs or to him, his heirs and assigns forever." 3 Jarman Wills, 30. These words were here used, and, as we have seen, it is the duty of the courts to affix to technical words their usual meaning, unless there is a clear manifestation of a purpose to use them in a different sense, and here the explanatory words, instead of manifesting such a contrary intention, exhibit an entirely different one, for they particularize incidents of the very estate which the technical words describe and devise.

It is contended that the word "or" should be read as "and" where it occurs in the clauses regarding the disposition of the land devised to Samuel B. Mann and his heirs. It is unquestionably true that the word "or" may often be assigned a conjunctive instead of a disjunctive effect. 1 Redf. Wills, 471; 1 Jarman Wills, 419. But changes of this nature are only made where it is clearly necessary to effectuate the intention of the testator, or give meaning and force to the will.

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The rule has long been settled that the word "or" will be read "and" when it is necessary to give effect to the words creating an estate of inheritance, but we know of no case holding that the word "or" will be read "and" for the purpose of defeating the effect of words accurately and clearly devising an estate of that nature. *Right v. Day*, 16 East, 67; *Read v. Snell*, 2 Atk. 642; *Harrison v. Bowe*, 3 Jones Eq. 478. The word "heirs" is one of dominating force, and it may sometimes compel a change of subordinate connective words, but connective words can not be changed when they are in harmony with the controlling provisions of the will; much less can they be changed when the ruling words of the instrument would be weakened or obscured by the change. 1 Preston Estates, 367. It is only in clear cases that courts ever venture to make changes. No word, great or small, can be changed, except, to borrow a phrase from Redfield, upon "the clearest certainty." 1 Redf. Wills, 471; *Holcombe v. Lake*, 4 Zab. 686.

It is no slight obstacle to the success of the appellee that it becomes necessary for him to require that the courts wrench the well known term "heirs" from its legal meaning, and also change the words of the will by substituting words not found in it for those that are. The obstacle is all the greater, because the explanatory words of the instrument fully harmonize with its technical terms, and add to their force, thus tending, with great power, to show that the intention of the testator was to devise just such an estate as the technical words employed would do if they stood alone.

The devise of the income of the land to Samuel B. Mann until his youngest child shall become of age is neither unintelligible, nor is it inconsistent with the theory that the testatrix intended that he should take a fee upon the happening of that event, nor does it even make an unreasonable testamentary disposition of the land. It is perfectly reasonable to presume, what, in truth, the language plainly imports, that the testatrix meant to deprive him of the power of disposing

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of the property so long as his children were unable to make their way in the world, so that he should have means of supporting them that he could not fritter away or lose by speculation or mismanagement. It may well be that she meant that as long as his children were not of age the power of disposition should be fettered, and that as soon as they attained full age he should have complete power over the property to do with it as he chose. Such a scheme of testamentary disposition is quite intelligible and perfectly reasonable, and in this instance entirely consistent with the whole frame and tenor of the will. More apt technical words to vest an estate, ripening into an absolute and unconditional fee upon the happening of a prescribed condition, could not have been chosen, than those adopted, and these words are in harmony with the general scheme evidenced by the whole tenor of the instrument by which the testatrix declared her intention regarding the disposition of her land.

The only persons designated as devisees, direct or remote, are Samuel B. Mann and his heirs. There is not a word expressive of an intention to give to him and to his children. The youngest child is not mentioned as a devisee, nor is any child; the reference to the youngest child is simply for the purpose of confining the conditional devise to a fixed time, namely, the time when that child attains full age. It is only in this connection that the word "child" is used; it is not used as descriptive of the object of the testatrix's bounty; it is simply used as marking the time when the devisee's estate shall ripen into an absolute fee simple. It is declared that upon the event of the youngest child's attaining full age, the fee simple of said land shall then vest absolutely in said Samuel B. Mann and his heirs; but it is not intimated, directly or indirectly, that it shall vest in him and his children. It would be a violent stretch of judicial power to thrust in devisees neither named nor described in the will. Had the word "child" been used for any other purpose than that of fixing the time when the estate should enlarge into a fee, there would be much

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more force in the contention of the appellee, but it was used for that and no other purpose.

It is by no means uncommon to affix conditions to a devise, and a less estate may be granted to continue until the happening of a prescribed event, then to enlarge into an absolute fee. This is what the will now before us does. In the present case both the particular estate and the remainder are in Samuel B. Mann, and the only doubt is whether the estate can be said to have ever been a defeasible one. *Boraston's Case*, 3 Coke, 19; *Goodtitle v. Whitby*, 1 Burr. 228; *Doe v. Lea*, 3 T. R. 41; *Doe v. Ewart*, 7 Ad. & Ell. 636; *Roome v. Phillips*, 24 N. Y. 463; *Phipps v. Ackers*, 9 Cl. & F. 583; *Edwards v. Hammond*, 3 Lev. 132.

It is the theory of the law that the particular estate and the remainder form one united estate, and that the whole estate issues out of the grantor at the same time, and if this be true, as it undeniably is, it would seem that the fee vests at once in the person to whom both the particular estate and the remainder are devised. 2 Washb. R. P. (4th ed.), 582, 596; 4 Kent Com. (12th ed.) 199; *Brattle Square Church v. Grant*, 3 Gray, 142; 2 Bl. Com. 166.

We need not, however, decide the question whether the estate in fee vested absolutely in Samuel B. Mann at the time of the testatrix's death, for, conceding that he took only a conditional fee, still, as the condition upon which the estate was granted had happened, his rights became absolutely vested. If the estate was a conditional fee, it became absolute when the contingency arose which destroyed the force of the condition. 1 Preston Estates, 476. We think that the devise must be regarded as creating a conditional or limited fee, restricting the right of alienation until the youngest child of the devisee arrives at full age.

A conditional fee may be created by a will as well as by a deed, and, as Preston says, "The existence of the condition precludes the estate of that simplicity which is the essential quality of a fee simple." 1 Preston Estates, 475, 476. The ex-

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istence of a condition subsequent does not, however, destroy the inheritable character of the estate. In the devise contained in the will before us, the condition is one restraining the power of alienation until a definite and specified time. Conditions like the one written in this will are effective, for they do not unreasonably restrict the power of alienation. *Langdon v. Ingram*, 28 Ind. 360; 1 Washb. R. P., top p. 80, side 54.

Counsel for appellee assert that "There is no question that the will gives to Samuel B. Mann a fee simple to an undivided part. The only question is whether Samuel B. Mann became vested with a fee simple title to the whole." The difficulty of maintaining the appellee's position is, that all the granting or devising words in the will import a several right in the devisee named, and do not imply a joint estate in him and others. *O'Brien v. Heeney*, 2 Edw. Ch. 242. To sustain this position all the words importing a several estate must be changed so as to make them describe a joint estate. To reach this conclusion it is not only necessary to change the word "or" into "and," but it is also necessary to change the singular pronoun "he" into the plural "they." We have already seen that changes are never made unless there is an imperious necessity, and there is here no such necessity, for the general frame of the will indicates an intention to make the devisee named the recipient of the bounty of the testatrix. But there are also the words "Samuel B. Mann and his heirs," still further manifesting, and in the most appropriate legal terms, the intention to bestow the estate upon one person and not upon three persons.

It is said that no one can have an heir during his life, and, therefore, that the words "his heirs" mean his children. The premise is true, but the conclusion does not follow. A devise to a man and his heirs vests an estate of inheritance which will go to the legal heirs, whether they are children or other kinsmen. At common law the word "heir" or "heirs," was the strongest term that could be used to create a fee, and in many cases was indispensably necessary to create such an

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estate. It can not, therefore, be logically possible that because the term "heirs" is used the devise is limited to children and the estate of the first taker cut down to an estate for life. If this conclusion be just, then for many centuries courts and authors have given a radically erroneous meaning to the words "his heirs."

The argument that, because the devisee named has living children at the time the will was made, the words "his heirs" mean his children, proves, if it proves anything, too much, and thus works its own overthrow. If this argument be sound, then all devises using those words create only a life-estate if there are children of the devisee living, and that this is not true all the cases upon the subject declare in most emphatic terms. If the words used are such as create an estate in fee, that estate the devisee takes, no matter whether he has or has not living children. The argument finds no support from any decision, nor can it be supported on principle; it is, indeed, flatly opposed on all sides, for the term "heirs" is the term, which, of all others, most strongly expresses an intention not to limit the estate to the children, but to bestow it in the most ample manner upon the devisee who first takes the estate.

In the case of *Vannorsdall v. Van Deventer*, 51 Barb. 137, the will gave to the wife of the testator all of his real estate during her lifetime, and then proceeded as follows: "*Fourth.* I give and bequeath to the legal heirs of my brother, Abram Vannorsdall, deceased. *Fifth.* And the legal heirs of my sister, Maria Snyder, deceased. *Sixth.* I give and bequeath to the heirs of my brother-in-law, William Van Deventer, all my real estate at the death of my wife, Elizabeth, to be divided equally between each of the heirs above named after the decease of my wife, Elizabeth Vannorsdall." The court held that the word "heirs" should be held to mean children of the persons named. There are several points of difference between the will in that case and the one in this, but it is only

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necessary to name one to show that the two cases are governed by entirely different principles. In the case cited the words of inheritance, "legal heirs," did not follow the name of the first taker; here they do. What has been said respecting the difference between the case cited and the present is equally true of the case of *Heard v. Horton*, 1 Denio, 165. It emphasizes this difference to note that in the case just named the contention was that the first taker took a fee, not by force of words creating such an estate, but by implication arising out of the fact that he paid a legacy charged upon the land devised. The point decided in *Simms v. Garrot*, 1 Dev. & Batt. Eq. 393, was this: "A legacy to the lawful heirs of A., when it appears in the will that he is living, is equivalent, as a description, to a legacy to his next of kin, or to his children." Here the devise is to "Samuel B. Mann and his heirs," and this statement of itself fully exhibits the difference between the two cases. The devise in *Burchett v. Durdant*, 2 Vent. 311, was: "I give to my cousin John Higden and his heirs, during the life only of Robert Durdant my kinsman, all those my messuages, etc., in Chobham in the county of Surrey; upon this trust and confidence, that he the said John Higden and his heirs, shall permit and suffer the said Robert Durdant, during his life, to have and receive the rents and profits thereof, which shall yearly grow due and payable. * * And from and after the decease of Robert Durdant, then do I give said lands and premises in Chobham unto the heirs males of the body of him the said Robert Durdant now living, and to such other heirs male and female as he shall hereafter happen to have of his body; and for want of such heirs, then to the use and behoof of my cousin Gideon Durdant and the heirs of his body."

The holding of the court, as the reporter gives it, was: "That this was a remainder vested in George Durdant; for the remainder being limited to the heirs of the body of Robert Durdant, now living, and George being found to be then the

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only son, it was a sufficient designation of the person, and as much as if it had been said, to his heir apparent," and that "George Durdant took an estate tail." In the case under immediate mention the words of inheritance were not coupled with the name of the devisee, but the devise was definitely and expressly to him during his life. The words "to his heirs" are found in a distinct clause, reading: "And from and after the decease of Robert Durdant, then do I give the said lands and premises in Chobham unto the heirs males of the body of him the said Robert Durdant now living." There was no first taker of the fee named coupled with words of limitation, but words describing persons who should take after the life expired are used. It is plain that this clause described a person, or a class, who were to take, and that as the devise to the ancestor was during life, and as there were no words of limitation coupled with his name, the persons described, as devisees of the fee, took by virtue of the devise, and not by inheritance. In the case at bar the words of limitation are appropriately coupled with the name of the devisee, and there are no words descriptive of a class, or of a person, except the named devisee; all the words employed are words of limitation directly annexed to the name of the first taker, and their effect is to measure the extent of the estate devised to the first named devisee. In *Darbison v. Beaumont*, 1 P. Wms. 229, the testator, after devising the estate to trustees for a term of years, settled it on "the first son of his body lawfully begotten, and the heirs male of such first son, lawfully issuing," and this was held to be a description of the person entitled to take. In the case cited there was no devise with words of limitation to a designated person. There was nothing more than a description of the person entitled to take the inheritance, and this distinguishes the case from the class to which the present belongs. It would have been very different if, in the case cited, a first taker had been designated, and his name followed by words of limitation, but there was nothing of the kind in the will.

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Where the appropriate words of limitation follow, and are appropriately connected with the name of the first taker, an estate in fee is created unless the superadded words clearly cut down the estate. This is an old and firmly established rule, and we have not travelled an untrodden path in reaching the conclusion that the words of limitation, coupled with the name of the devisee, do not describe a class who are to take by devise, but operate to vest in the first taker an estate in fee simple. In the case of *Jack v. Fetherston*, 9 Bligh, 237, the subject received a thorough discussion. TINDAL, C. J., in the course of his opinion, said: "The words which first occur in the devise, 'I give to my kinsman William Fetherston and his heirs male my real estates,' do, in a will, give to the devisee a clear and unequivocal estate tail. The only question therefore is, whether the words which follow do with equal clearness and certainty cut down the estate tail so given to the devisee into an estate for life, and make his sons to take estates tail as purchasers, instead of by limitation." In *Poole v. Poole*, 3 B. & P. 620, Lord ALVANLEY said: "The first taker" shall be held to have an estate tail "where the devise to him is followed by a limitation to the heirs of his body, except where the intent of the testator has appeared so plainly to the contrary that no one could misunderstand it." The case of *Toller v. Attwood*, 15 Q. B. 929, is not unlike the present; there the devise was to E. for her separate use for life, with remainder to trustees to preserve contingent remainders, with remainder to the heirs male of the body of E. to be begotten, who shall live to attain the age of twenty-one years, and to his heirs and assigns forever, and it was held that the words, "who shall live to attain the age of twenty-one years," could not restrict the force of the words of limitation contained in the devise, and that E. took an estate tail. There are very many other cases declaring this doctrine. *Mills v. Seward*, 1 J. & H. 733; *Grimson v. Downing*, 4 Drew. 125; *Anderson v. Anderson*, 30 Beav. 209; *Moore v. Brooks*, 12 Gratt. 135; *Tipton v. LaRose*, 27 Ind. 484; *Small*

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v. *Howland*, 14 Ind. 592. In attaching great weight to the words of limitation, "his heirs," used as they are in close conjunction with the name of the first taker in the devise before us, we do no more than obey a rule which has, as Chancellor Kent says, for more than five hundred years formed part of the law, and upon which this court has again and again built its judgments. In thus regarding the words, we bring this case within the great class of cases found in the books, and distinguish it from the class of cases represented by *Burchett v. Durdant*, *supra*, and *Darbison v. Beaumont*, *supra*. The class represented by these cases is, in numbers, very limited, and in character somewhat anomalous, but there is nothing in the decisions in the cases belonging to that class which antagonizes the great rule of property which controls cases like the one at bar. In all of the cases represented by *Burchett v. Durdant*, *supra*, and *Darbison v. Beaumont*, *supra*, the words of the devise were to the heirs of a person named, not to a named person and his heirs, as "to the heirs of Robert Durdant," and this phrase is rightly construed to mean kinsmen, for, otherwise, there would be no one capable of taking, because no man can have heirs during life; but where the devise is to A. and his heirs, there is a person capable of taking the whole estate, and with his name are connected words of limitation describing such an estate. If, in the case of *Burchett v. Durdant*, *supra*, the devise had read to Robert Durdant and his heirs, then the case would have been in principle like the one in hand; but there was no such provision. There was a provision essentially different, describing a class who were to take, and excluding, in unmistakably plain terms, the first taker from anything more than a life-estate.

Judgment of the general term of the superior court reversed, with costs.

Filed Dec. 12, 1884. Petition for a rehearing overruled Feb. 20, 1885.

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No. 11,477.

SHELBYVILLE AND BRANDYWINE TURNPIKE COMPANY ET
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99	205
124	580
99	205
134	213
135	554
99	205
164	444

NEW TRIAL.—*Special Findings.*—*Practice.*—Where the court finds the facts specially with its conclusions of law, matters not in issue, or which, in view of the facts found, are immaterial, need not be found, and the omission to find them is not cause for a new trial.

WATERCOURSE.—*Levees.*—*Injunction.*—*Easement.*—One may, by levees on his own land, protect it from overflow by floods, not, however, obstructing the channel of any stream; and for this purpose he may make his levee over the way of a turnpike company having an easement upon his land, not injuring the use of the way, and though his levee cause a greater overflow of water upon the land of others, and upon the turnpike elsewhere, his levee will be protected by injunction.

From the Shelby Circuit Court.

B. F. Love, A. Major and H. C. Morrison, for appellants.
T. B. Adams and L. T. Michener, for appellee.

BICKNELL, C. C.—This was a complaint for an injunction by the appellee against the appellants.

The complaint alleges that the turnpike of the defendants passes through the plaintiff's land; that the plaintiff, on the east line of his land, has built a levee to prevent overflow by high water; that the levee and turnpike are united together at the sides and on the top of the turnpike, but that the levee does not in any way interfere with the public or corporate use of the turnpike, or of the adjacent ground; that the defendants are wrongfully entering on the levee and detaching it from the turnpike by removing the earth from the levee for a distance of ten feet, thereby exposing it to destruction, and the plaintiff's land to overflow from Blue river; that the levee, as it was built, will prevent such overflow from coming on plaintiff's land, as it often did, to his great damage, before said levee was built; that if said levee is detached from said turnpike as aforesaid, great and irreparable damage will be suffered by the plaintiff.

The defendants answered in three paragraphs, of which the

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second was the general denial. The first and third paragraphs alleged, in substance, that the overflowings of Blue river had always gone over the plaintiff's land and returned into the river below; that the plaintiff's levee came upon the top of the turnpike and made it about three feet higher, making a sharp ridge there difficult for loaded teams, and that the effect of the levee was to flood the turnpike, making it impassable, whereby it obstructed the defendants' right of way, to their great damage; that the plaintiff built his levee after being notified by the defendants not to do it; that they had only removed from the top and sides of their road the dirt unlawfully placed there by the plaintiff, and that this was all they intended to do.

The defendants also filed a cross complaint, alleging, substantially, the same matters, and claiming \$1,500 damages, and that the plaintiff be required to remove his levee from the said right of way, and take it down so that it will not injure the defendants' road.

The plaintiff replied denying the special defences, and he answered the cross complaint by a denial. The issues were tried by the court without a jury, and at the request of the parties the court made a special finding of the facts and stated the conclusions of law thereon.

The following are the special findings:

"1. At the commencement of this suit the plaintiff was and still is the owner in fee simple and in possession of the real estate described in the complaint.

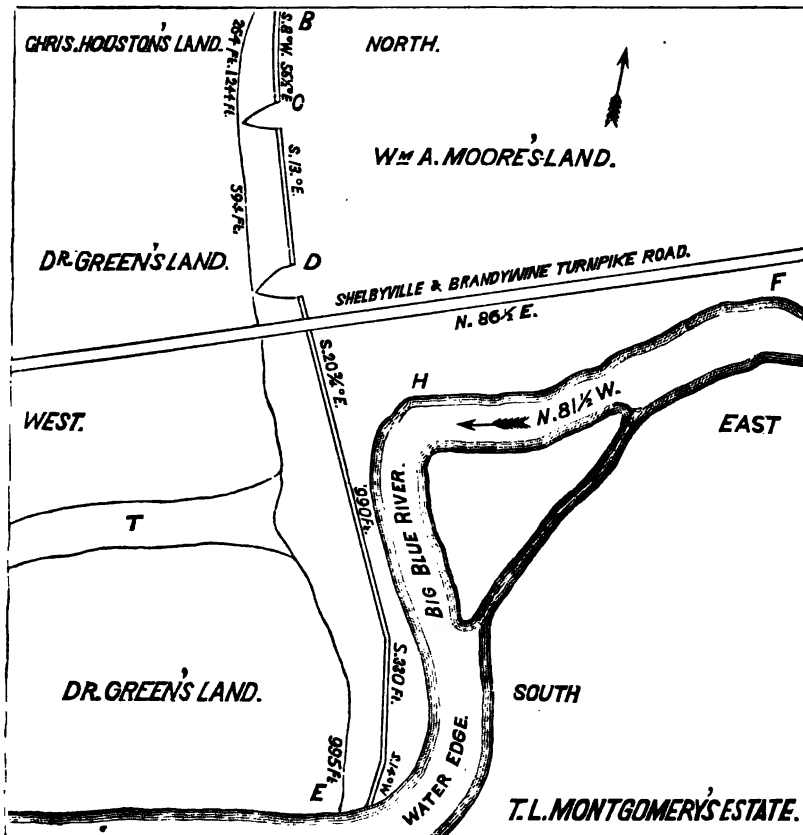
"2. In 1862 and 1863 the Shelbyville and Brandywine Turnpike Company constructed a turnpike road from Shelbyville to Brandywine creek, in said county, which road was constructed through the lands of plaintiff, described in the complaint, and have been in the possession of said line of road since said time.

"4. That said real estate is contiguous to a stream of water, known as Big Blue river, which flows along a portion of the east and south sides of plaintiff's land, which will

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more fully appear by reference to a map attached hereto, and to be considered as a part of this finding, as follows, to wit:

"MAP A.



“ 5. The greater portion of said real estate lies in the valley of said river, and is what is commonly known as bottom land, used by the plaintiff for general farming purposes, and has been so used for many years.

“ 6. All that portion of said realty lying in said valley, at the time of building the levee hereinafter mentioned, has, and for a great many years prior thereto, and before and since the

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building of said turnpike, had been subject to inundation and overflow by the waters of said river in time of freshets, when the waters of said river were above the banks of said river and flowed over the said turnpike road, and also spread over said realty and adjoining lands, washing and carrying therefrom fences and soil, and injuring and destroying crops growing thereon, to the great damage of the plaintiff and the turnpike company.

"7. In the summer and fall of 1881 and 1882, the plaintiff constructed and now maintains an earthen levee or embankment on the east side of said real estate, but within the boundaries thereof, for the purpose of protecting his said crops and realty from the washing of the high waters, incident to the overflow of the high waters and freshets from said river, which will be learned and its relation to said land will more fully appear by reference to the map herewith.

"8. The plaintiff built and constructed said levee against and upon the embankment and road-bed of said turnpike, where it crosses the east line of said lands of plaintiff, so that the levee and turnpike are united together at the sides and on the top of the turnpike, but said levee or embankment does not interfere with or render inconvenient the public or corporate use of and enjoyment of said turnpike road, or the adjacent ground.

"9. At the commencement of this suit Christopher Houston, Samuel D. Day and Allen Thomas were directors of said turnpike road, and said Houston was acting in the capacity of superintendent of said road.

"10. At the commencement of this suit, the said turnpike company, through its superintendent, Houston, and his employees, had entered upon said levee, and were detaching it from said turnpike, by removing the earth composing the said levee from the top of the said turnpike where the levee crosses it as aforesaid, and were removing the earth and destroying the said levee thereon, and thereby exposing the said levee to destruction, and said real estate to washing and overflow by

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high waters from said river, and the defendants were threatening to and will cut said levee from the embankment of the turnpike and virtually destroy the same, unless enjoined.

"11. That said levy, if not detached from said turnpike, and if permitted to remain as it was built, will prevent the high waters of said river from overflowing and washing said real estate to a large extent, and will thereby prevent much damage to said lands and to the plaintiff.

"12. That, previous to the construction of said levee, there was and still is a depression washed out across the lands of plaintiff, commencing a few rods from the river bank, at the bend of the river where the same turns in a southerly direction, and when there was a rise in said river the water passed over said lands of plaintiff.

"13. That, in the construction of said turnpike, the said company took possession of and occupied the right of way occupied by the said road-bed and embankment, with the consent of plaintiff's grantors, and have continuously occupied the same since he became the owner of said lands with his consent.

"14. That the said company, in the construction of their road, did not, and since that time have not constructed any ditches or drains through the land of the plaintiff.

"15. The depth of the flow of the high water, east of plaintiff's levee and over said turnpike road, for the distance of one-fourth of a mile, has been and will be greater by reason of the erection of said levee than before; that this flow is east of plaintiff's lands, and where the turnpike road is located on the lands of William A. Moore, from whence it flows back over the lands of plaintiff and said turnpike west of said levee, and by reason of checking the flow of the water over said depression and the lands of the plaintiff rendering the defendants' road more liable to be overflowed and damaged on the lands of said Moore east of the lands of plaintiff where the road-bed is not so high as said levee.

"16. The said levee does not obstruct any channel of said

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river, nor is any part of said levee erected in or across any channel of said river in whole or in part.

"17. Soon after the said turnpike was constructed through said lands, the then owners of said lands erected fences at the sides of said turnpike embankment, and said fences have since been maintained, and are now where they were originally erected.

"18. Before the plaintiff constructed his said levee the defendants, the said turnpike company, notified him not to erect any part of his said levee on or over their right of way or road-bed.

"19. The defendants Day and Thomas have done no act toward the removal of the plaintiff's levee except while sitting as members of the board of directors, and acting for said company, in officially entering an order on the books of said company, ordering the said Houston to remove said levee from the company's right of way, which the said Houston was proceeding to do, when this suit was commenced.

"20. The construction of said levee on the lands of said plaintiff prevents the flow of water over his lands in the time of freshets, and thereby to some extent prevents the water from flowing beyond the limits of plaintiff's lands as rapidly as it otherwise would do, and has the effect to bank up the waters on the lands of William A. Moore and on and over the turnpike of the defendants in extraordinary and unusual freshets or floods, and making it more liable to wash and be destroyed for the distance of one-fourth of a mile.

"21. The said company obtained an easement over the lands of plaintiff by going thereon and constructing their road with the consent of the then land-owners, and by no other means."

Upon the foregoing facts the following were the conclusions of law:

"1. As to the defendants Samuel D. Day and Allen Thomas there is an entire absence of proof to show any personal liability against either, and no cause of action exists as against either of them.

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"2. The plaintiff, William F. Green, had the legal right to occupy the right of way of the said company with his levee, and build his levee over the travelled track thereof, so that he did not obstruct the rights of said company, or the public right of travel over the same.

"3. The plaintiff, Green, had the legal right to erect his levee on his own lands and fight the floods and freshets from his lands the best way he could, doing no unnecessary damage to the defendants, and because the said turnpike road was and is rendered more liable to overflow and damage would not in any way affect his right to erect and maintain his said levee.

"4. The said Day and Thomas should have judgment for their costs against the plaintiff.

"5. The plaintiff should recover against the defendants, the said Houston and the said turnpike company, and the injunction heretofore granted should be made perpetual.

"6. The defendant, the said turnpike company, should take nothing by its cross complaint herein."

To each of these conclusions of law the turnpike company and Houston excepted jointly and severally, and they jointly and severally moved for a new trial, and said motions were overruled and were followed by the proper exceptions to such overrulings, and by judgments upon the special findings, in favor of the defendants Day and Thomas, and against the defendants Houston and the turnpike company, pursuant to the prayer of the complaint. Said last named defendants jointly and severally excepted to the judgment against them, and they jointly appealed therefrom.

They assign errors jointly as follows:

1. In overruling the joint motion for a new trial.

2 and 3. In the conclusions of law.

4. In rendering the judgment.

And each of said appellants assigns separately the same errors as numbers 2, 3 and 4 of the joint assignment, and also error in overruling their separate motions for a new trial respectively. The joint and several motions for a new trial

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present the same reasons therefor. These reasons are that the findings of the court are contrary to law and are not sustained by sufficient evidence, and among the reasons for a new trial, it is alleged that the finding is contrary to law, because the court ought to have found and did not find facts proved under the issues, in the following particulars, to wit:

1, 2, 3 and 4. As to the amount of damages sustained by the turnpike company by the erection of the levee. Upon this it may be observed, that if the findings had been in favor of the appellants upon their answers and cross complaints, then the amount of damages might have been material, but the finding being in favor of the appellee throughout, the damages were not material. If the appellee had a right by building his levee to defend himself against the overflow, although by so doing the overflow on other land was increased, no damages could be recovered for such increase, and the amount thereof was altogether immaterial.

5. That the court failed to find the height of said levee above the travelled track of the road. If the appellee had the right to construct the levee as it was, the question as to its precise height was not at all material.

6. That the court did not find the width of the road where the levee crossed it.

7. That the court did not find the width of the appellant's right of way where the levee crossed it. But the court did find that the company occupied their embankment and road-bed, and that the owners of the adjoining lands placed their fences at the foot of the embankment, and have had them there ever since, and that the company never constructed any drains or ditches for its road on appellee's land. The width of the road and right of way under the findings of the court were altogether immaterial.

8. That the court did not find the description, beginning, height, bearing or distance of the levee. But the map, which is part of the finding, contains a sufficient description of the levee.

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9. That the court does not find the distance between the south end of the levee and Elliott's levee on the opposite side of Blue river. But the court does find that the levee does not, in whole or in part, obstruct the channel of the river.

10 and 11. That the court did not find what would be the effect upon the road, as to the backwater, of removing all or part of the levee therefrom.

12 and 13. That the court found nothing as to what was the intention of the company in removing the levee. These matters were all immaterial, if the appellee had the right to build the levee as it was built, and this the court found.

14 and 15. That the court did not find the relative heights of the road and levee, nor the relative heights of the surface of the lands on both sides of the road. There was no issue as to any such matters, and they were immaterial.

16. That the court did not find whether the company owned the road, and was taking toll on it. There was no issue as to this matter. But the court did find that the company made the road by consent of the owners of the land, and was using and occupying it.

17. That the court did not find whether the place from which the company removed part of the levee was a part of the company's road. The court did find that the company was removing part of the levee from its right of way.

18. That the court did not find the depth of the removal of the levee. But the court finds that the defendants were removing it, and would remove it all unless enjoined; the precise quantity of earth taken away is immaterial; if the levee was lawfully there, the company had no right to remove any of it.

If all the matters above mentioned had been found by the court the legal effect of the facts would not have been changed. The findings were not contrary to law, and there was evidence tending to sustain all of them. There was no error in overruling the motion for a new trial.

The controlling questions in the case arise upon the speci-

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fications alleging error in the conclusions of law. And the first question is, what are, in Indiana, the rights of a land-owner to protect himself against freshets and overflows? In *Taylor v. Fickas*, 64 Ind. 167 (31 Am. R. 114), it appeared that there was a frequent overflow in the Ohio river, and that the defendant had planted a row of trees on his own land, the effect of which was to cause the driftwood, which before had been carried by the overflow across and beyond the plaintiff's land, without damage to him, to lodge upon the plaintiff's land, and cover five acres of it with driftwood and brush from two to ten feet high, whereby said five acres became of no value. It was held that this gave the plaintiff no cause of action. It appeared there, as in the present case, that the overflow was the result of temporary causes, and was not usually there.●

This case was cited with approbation in *Schlichter v. Phillipy*, 67 Ind. 201, and also in *Cairo, etc., R. R. Co. v. Stevens*, 73 Ind. 278 (38 Am. R. 139).

In the case last cited it was stated, as a general rule, that, "upon the boundaries of his own land, not interfering with any natural or prescriptive watercourse, the owner may erect such barriers as he may deem necessary to keep off surface-water or overflowing floods coming from or across adjacent lands; and for any consequent repulsion, turning aside or heaping up of these waters to the injury of other lands, he will not be responsible."

This must now be regarded as the established law in Indiana. See *Weis v. City of Madison*, 75 Ind. 241 (34 Am. R. 135); *Benthall v. Seifert*, 77 Ind. 302; *Cairo, etc., R. R. Co. v. Houry*, 77 Ind. 364. And this is decisive of the present case. The turnpike company, owning merely an easement, has no rights superior to those of land-owners. As to highways in general, the right of the public is only to pass and repass along the road. *Dovaston v. Payne*, 2 H. Bl. 527. The ownership of the soil of the highway is vested in the owner of the land over which it passes. *Lade v. Shepherd*, 2 Strange, 1004; *Stevens v. Whistler*, 11 East, 51.

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The trees upon it, not needed for the repairs of the road, the pasture thereon, and the mines beneath it, belong to the owner of the soil; he may tunnel beneath it or put a bridge across it if the easement be not interfered with. *Goodtitle v. Alker*, 1 Burr. 133, per MANSFIELD; *Doe v. Wilkinson*, 3 B. & C. 413. It is no breach of the covenants of seizin and a right to convey, that a highway passes over the land. *Vaughn v. Stuzaker*, 16 Ind. 338. And it has been held that the owner of the soil may spread earth on the highway for the purpose of improving it as a way. *O'Linda v. Lothrop*, 21 Pick. 292. A highway is said to be nothing but an easement, comprehending merely the right of the public to pass and repass, and to do all acts necessary to keep the highway in repair. This easement does not embrace any interest in the soil; the freehold continues in the owner of the soil subject to the easement. *Peck v. Smith*, 1 Conn. 103. The owner retains every right except the easement belonging to the public. *Trustees, etc., v. Auburn, etc., R. R. Co.*, 3 Hill, 567. And this is the law of Indiana. *Brookville, etc., Co. v. Butler*, 91 Ind. 134 (46 Am. R. 580). So, in the case of an incorporated turnpike company, the corporation has, ordinarily, a mere franchise or incorporeal hereditament authorizing it to make and maintain the road and take tolls. *Tippets v. Walker*, 4 Mass. 595; *Fisher v. Coyle*, 3 Watts, 407. The freehold, subject to the easement, remains in the owner of the soil. *Ridge Turnpike Co. v. Stoever*, 2 Watts & Serg. 548; *Vaughn v. Stuzaker, supra*; *Cox v. Louisville, etc., R. R. Co.*, 48 Ind. 178.

The foregoing authorities show that there was no error in the conclusions of law. For the purpose of determining the validity of such conclusions, the facts found must be regarded as correctly found. Here the facts found are, substantially, that the plaintiff, to protect himself from the occasional overflowings of Blue river, built a levee on his own land, which accomplished his purpose, but at the same time increased the quantity of water carried by these overflowings upon the adjacent lands and upon the turnpike, but that the levee did

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not obstruct any channel of Blue river, and was not erected across any such channel either in whole or in part, and does not interfere with or render inconvenient the public or corporate use and enjoyment of the turnpike or the adjacent ground. Upon these facts the plaintiff did exactly what he had a right to do. The easement of the turnpike company gave no rights in this matter superior to those of an adjacent land-owner, and the facts that the turnpike was built by the plaintiff's consent, and that he was notified not to build his levee really amount to nothing.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things, affirmed, at the costs of the appellant.

Filed Sept. 27, 1884. Petition for a rehearing overruled Jan. 23, 1885.

99	216
128	229
99	216
150	396
99	216
165	443

 No. 110,27.

ALLEN v. DAVIS.

MARRIED WOMAN.—*Can not Mortgage her Real Estate for Husband's Debt.*—Since the act of April 16th, 1881, went into force, a married woman can not execute a binding mortgage upon her real estate to secure her husband's debt.

WITNESS.—*Contradictory Statements.—Evidence of, for Impeachment only.*—The contradictory statements of a witness, introduced to impeach him, can only be considered for such purpose, and can not be regarded as substantial proof of the facts in dispute between the parties.

From the Grant Circuit Court.

W. L. Lenfesty and J. H. Compton, for appellant.

G. L. McDowell, J. F. McDowell, T. A. Hendricks, A. W. Hendricks, C. Baker, O. B. Hord, A. Baker and E. Daniels, for appellee.

BEST, C.—The appellee brought this action against the appellant and Joseph G. Allen to foreclose a mortgage executed

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by them on the 28th day of September, 1881, to one Francis Kelly, who endorsed the same to the appellee.

Afterwards the death of Joseph G. Allen was suggested, and the case proceeded against the appellant. She filed an answer, alleging that at the time said mortgage was executed she was the wife of Joseph G. Allen; that she owned the land embraced in the mortgage, and that the same was executed to secure the debt of her husband.

This answer was denied; the issue tried by the court; a finding made for the appellee; and, over a motion for a new trial, on the ground that the finding was contrary to the evidence and the law, judgment was rendered upon the finding.

The ruling upon the motion for a new trial is assigned as error. The evidence is in the record. The appellant testified that when the mortgage was made she was a married woman, that she owned the land, and that the mortgage was made to secure her husband's debt. This testimony fully supported the answer.

The deposition of her deceased husband was also read, tending to establish the same facts, but several witnesses were called who testified that he had made statements different from his testimony. This only tended to impeach him, and did not tend to establish the truth of such statements as substantive testimony in the case, nor could they be considered as disputing the facts to which the appellant testified, and, as she was not otherwise contradicted, her testimony was undisputed.

If the answer was good, a complete defence was established, and this seems to be the question, though issue was taken upon the answer. This court has several times decided that a married woman, since the act of April 16th, 1881 (Acts 1881, p. 527), went into force, can not execute a binding mortgage upon her real estate to secure her husband's debt, and upon the authority of these cases, on the facts as disclosed by the evidence, it must be held that the appellant is not bound by this mortgage.

It is averred in the complaint, as we think, that this mort-

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gage was given for the purchase-money of the real estate embraced within it, but no such fact appears in the evidence. If, upon another trial, it shall so appear, a very different question will then be presented.

For these reasons we think the court erred in not granting a new trial, and for such error the judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby reversed, at the appellee's costs, with instructions to grant a new trial.

Filed March 8, 1884. Petition for a rehearing overruled March 14, 1885.

No. 10,542.

ROGERS ET AL. v. THE STATE, EX REL. GRIMES, AUDITOR.

COUNTY TREASURER.—*Liability of Sureties on Bond.*—Where a county treasurer is elected his own successor, his sureties for the first term are liable for any defalcation existing at the end of that term.

SAME.—*Defalcation.—Application of Payments.*—A county treasurer, having served two successive terms, was a defaulter at the end of each, and afterwards made payments upon the aggregate without any designation as to their application by any one. Some such payments were derived, 1. From loans and investments of the moneys for which he was in default. 2. From sources having no connection with the office. The sureties on both bonds were equally solvent.

Held, in a suit on the first bond, that the court should apply payments from the funds of the first class to the defalcation of the term from the moneys of which the loans and investments were made, and those of the second class to the defalcation of the first term.

SAME.—*Settlements.—Pleading.*—To a suit on a county treasurer's bond an answer that at the close of his term he had accounted for all moneys to, and settled with, the county board, is bad on demurrer.

SAME.—*Payment.—Reply.—Harmless Error.*—To an answer of payment to a complaint on a county treasurer's bond, a reply that such payment was made out of money coming to the officer as such, during a succeeding term of office, is bad; but it is a harmless error to hold it good on demurrer if it appears by the record that there was no evidence whatever offered in its support, and a finding in answer to interrogatories showing that it was not true.

99	218
135	454
99	318
145	509
99	218
157	457
99	218
1167	57

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SAME.—Evidence.—Settlements of County Treasurer.—Harmless Error.—In a suit on a county treasurer's first bond, the refusal to admit in evidence his annual settlements during his succeeding term of office is a harmless error where it appears that their admission could not have changed the result.

SAME.—Parol Testimony as to Contents of Books of Account.—Competent witnesses who have examined a county treasurer's books may testify to the amount of the treasurer's receipts and disbursements, as they appear by the books.

PRACTICE.—Amendment. — Reswearing Jury.—An amendment of pleadings upon the trial, unless it appears that the issues were changed thereby, does not make it necessary to reswear the jury.

SAME.—Argument of Counsel.—In a civil case the court may forbid the argument of a question of law before the jury, there being no controversy as to the facts upon which the question arises.

SAME.—Supreme Court.—Excessive Damages.—The Supreme Court will not reverse for excessive damages given by general verdict, nor for erroneous instructions concerning the subject of damages and inducing the excess, if in answer to interrogatories the jury has found all the facts, so that the proper damages can be computed, but will affirm on condition that the appellee remit the excess.

From the Superior Court of Vigo County.

W. E. McLean, N. G. Buff, I. N. Pierce and D. T. Morgan,
for appellants.

C. F. McNutt, for appellee.

HAMMOND, J.—The appellant Rogers was treasurer of Vigo county for two terms. His first term was from August 21st, 1877, to August 21st, 1879, and his second from the latter date to August 21st, 1881. This was a suit against him and his sureties, the appellants herein, upon the bond given for his first term. The breach assigned was that at the close of his first term Rogers was a defaulter, and failed to account for and turn over to himself, as his own successor in office, a large sum of money, to wit, \$25,000, with which he was then chargeable as such treasurer. Issues were formed, which were tried by a jury, and a general verdict was returned for the appellee in the sum of \$10,856.53. With their general verdict the jury also, in answer to interrogatories submitted to them by the court at the request of the parties, found spe-

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cially upon all the important questions of fact involved in the case, about which there was any controversy. The interrogatories submitted at the request of the appellee, and the answers of the jury thereto, were as follows:

"1. What amount did Rogers fail to pay over to himself, as his own successor, on the 22d day of August, 1879? Ans. Twenty-eight thousand nine hundred and eighty-four dollars (\$28,984).

"2. What amount of the moneys loaned by said Rogers during the first term has been collected by him and turned back into the treasury since the end of said first term? Ans. Eleven thousand six hundred and ninety-four dollars (\$11,694).

"3. What amount of interest earned by moneys in his hands, as treasurer, during the first term, has been collected by him since the end of said term and turned into the treasury? Ans. One thousand six hundred and fifty-four dollars and fifty-three cents.

"4. What amount of moneys of the first term did Rogers put into the lands sold to Beach, Shannon *et al.*, and in the improvements on said lands? Ans. Sixty-three hundred dollars (\$6,300).

"5. What amount of moneys derived from the second term did Rogers put into the purchase and improvement of said lands sold to Beach, Shannon *et al.*? Ans. Fifty-nine hundred and four dollars (\$5,904).

"6. What amount of money did the said Rogers put into the improvements or purchase of said lands so sold, which was not derived from either term of said office? Ans. Eight hundred dollars (\$800).

"7. For what sum was the lands sold to Beach, Shannon, *et al.*? Ans. Ten thousand dollars (\$10,000).

"8. Was the money for which said land sold to Beach, Shannon *et al.*, paid over to Ray, the successor of Rogers, after Rogers went out of office? Ans. Yes.

"9. From what source did the said Rogers derive the \$1,250 paid over to Ray as his successor, after he, Rogers,

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went out of office? Ans. Rents of farms, mostly his wife's land.

"10. What consideration did Rogers pay his wife for the \$4,000, to raise which she mortgaged her separate property? Ans. He assigned and transferred to her his interest in the firm of Snapp & Rogers, in lumber, etc., business.

"11. What amount of money did Rogers pay into the firm of Snapp & Rogers. Ans. \$3,854.

"12. From what source did said Rogers obtain or derive the money which he put into the partnership of Snapp & Rogers, and when did he put said money into said partnership? Ans. He checked on his account in bank, which was in the name of 'Newton Rogers, treasurer.' He so paid said money, a small part of it in February, and the balance in May, 1881.

"13. Did the said Rogers pay over to his successor Ray, and at what time, the \$4,000 which his, Roger's, wife raised by mortgage upon her real estate, and mentioned in interrogatory No. 10? Ans. He did pay it to Ray, his successor, and so paid it on the 20th day of October, 1881."

The interrogatories submitted at the request of the appellants and the answers thereto by the jury were as follows:

"1. Was there any defalcation on account of Rogers' second term? Answer. Yes.

"3. When did said defalcation occur, if any? Ans. When he went out of office, on the 22d day of August, 1881, and in failing to pay over to his successor the full amount of money with which he was chargeable.

"4. What was the amount of such defalcation, if any? Ans. The total amount of the defalcation at the end of the last term, including that of the first term, was, on the 22d day of August, 1881, \$34,771.73.

"5. What amount did Rogers pay or put into the treasury on account of his salary and fees during the second term, derived from the second term? Ans. \$15,000.

"6. What amount did Rogers pay into the treasury during

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the second term from the interest on loans during such second term? Ans. Twenty-six hundred and twenty-five (\$2,625) dollars."

The appellants moved for judgment in their favor upon the special findings of fact, which was overruled, and judgment was rendered for the appellee for the amount named in the general verdict, over the appellants' motion for a new trial.

That the sureties on the first bond of Rogers were responsible for the defalcation, if any, which occurred during or at the close of the first term, is quite well settled. *Ohning v. City of Evansville*, 66 Ind. 59; *Yost v. State, ex rel.*, 80 Ind. 350. Where an officer is elected his own successor, giving a bond for each term, it is but just and equitable that the sureties on each bond should be held responsible for the proper application of the public money of the term for which the bond was given, and nothing more.

A county treasurer is required to execute a bond to the acceptance of the board of county commissioners. Section 5911, R. S. 1881. Every official bond given by an officer is obligatory upon him and his sureties for the faithful discharge of all duties required of such officer by any law in force at, or subsequent to, the time of its execution. Section 5528, R. S. 1881. It is the duty of a county treasurer at the expiration of his term of office to deliver to his successor in office all public money with which he is then chargeable. Section 5925, R. S. 1881. Where an officer, intrusted with public funds, is elected his own successor, it is as much his duty, at the close of his first term, to have on hands to pay to himself as his own successor the moneys for which he is then officially accountable, as it would be to have the same in readiness to pay another who might be chosen as such successor.

The case of *Goodwine v. State, ex rel.*, 81 Ind. 109, was an action upon the official bond, executed for his second term, of a township trustee who was elected as his own successor. The special findings of fact showed that at the end of his first term he was chargeable with \$2,246.41 which he had invested in

cattle and stock, and that during his second term he received from such investment \$2,400. At the close of his second term he failed to pay to his successor \$1,163.24 for which he was liable by virtue of his office. The sureties on the second bond insisted that the defalcation occurred during the first term. This court, speaking by WOODS, J., said: "The facts found by the court show that Thomas" (the trustee) "became a defaulter in his prior term of office—not because he invested money received from public sources in his private business, for that he had a right to do, so long as he kept himself ready to pay out according to law all sums required for public use. *Linville v. Leininger*, 72 Ind. 491, and cases cited; *Bocard v. State, ex rel.*, 79 Ind. 270; *Brown v. State, ex rel.*, 78 Ind. 239. But because, at the end of his term, he did not have in his hands to turn over, and did not turn over, to his successor (himself), the amount for which he was then accountable. And had he never made good this defalcation, his prior bondsmen, and not the appellants, would have been responsible therefor. He did, however, make it good, as the facts show. By the sale of his property, he obtained money and replaced that for which he was in default, and when he did this, the appellants" (sureties on the second bond) "became liable therefor, as much as if another had been his predecessor in the office, and that other had been in like default and had afterwards made it good by payment to Thomas of the amount due."

The evidence without conflict fully sustained the special finding of the jury, that Rogers, at the close of his first term, was in default in the sum of \$28,984, by reason of not having that amount ready to pay to himself as his own successor. He was also a defaulter for his second term, and the principal controversy arises over the application of the credits to which he was entitled according to the special findings. It does not appear from the special findings, nor from the evidence, that when, during the second term, he received money which was derived from the first term or from any other source, he manifested or had any intention as to the applica-

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tion of such money, whether upon the liability of his first or second term. Nor do the findings or evidence show that when, after the close of his second term, he made payments to his successor in office, he gave any direction as to the application of such payments, or that any such application was specially made by the officer succeeding him, or by the county board. We do not decide whether such officer or county board could have made such application so as to bind the sureties of either bond, but simply state the absence of a fact which does not enter into the complications of the case. The application of the credits, under the special findings of fact, became a question of law. The appellants, who are the sureties on the first bond, insisted in the court below, as they do in this court, that the credits should have been applied to the extinguishing of the liability of the first term before any application thereof should have been made to that of the second term. It will be observed from the special findings that the moneys entering into the credits were derived in specified sums from loans or investments made during each term of the office, and also from sources disconnected with either term. The court below held that the money, when received from either term, should be applied to the deficit of the term from which it was derived, and, where it came from other sources, that it should be applied *pro rata* on the liability of each term. As to the application upon the liability of each term of the money derived therefrom, the decision of the trial court was based upon principles of equity and was sustained by authority. *United States v. Irving*, 1 How. 250; *Rochester v. Randall*, 105 Mass. 295 (8 Am. R. 519).

But as to moneys for which Rogers was entitled to credit and which were not derived from either term of his office, there are no equitable principles requiring its application to the liability of one term more than the other, or *pro rata* upon both terms, and its application should be governed by the rule of law applicable in such case. This rule, as stated by FRAZER, J., who spoke for the court in *King v. Andrews*,

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30 Ind. 429, is as follows: "When a person owes upon several distinct accounts, he has a right to direct his payments to be applied to either, as he chooses; but if he pays generally, then the creditor may apply as he elects; and if neither makes a specific application, then the court will usually make the application, first to the most precarious security, or to the oldest debt."

The evidence does not disclose that the security of either bond is doubtful, and they are, therefore, both presumed to be good. It follows that, under the rule above announced, which has often been approved by this court, moneys not derived from either term, to which Rogers is entitled to credit, should be applied to the liability of the first term, as the older debt. Under this view, the credits on such first liability should be as follows:

Money loaned during first and collected during	
second term	\$11,694 00
Interest collected during second term on loans	
made during first term	1,654 53
Proportionate amount of credit from the payment	
of \$10,000, derived from sale of real estate .	5,459 28
Payment of money derived from neither term .	1,250 00
Total credits on first term	\$20,057 81
Deducting these credits from the \$28,984, the	
amount of the default of the first term, leaves	
as the principal sum due from that term . . .	\$8,926 19
To this add interest	300 00
Also statutory penalty of 10 per cent.	912 61

Amount due at date of judgment, April 1st, 1882 . \$10,138 80

By this exhibit the judgment below was for \$717.73 in excess of the amount which the appellee should have recovered.

A demurrer was sustained to a paragraph of appellants' answer, which alleged that Rogers, after entering upon his second term, fully accounted to and settled with the county board

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for all moneys for which he was accountable at the close of his first term. There was no error in sustaining this demurrer. Such settlements at most are only *prima facie* evidence. *Hunt v. State, ex rel.*, 93 Ind. 311. While they might have shown that Rogers, in his second term, had charged himself with the amount for which he was responsible at the end of his first term, it is not alleged, nor is it presumed, that they did show that he, in fact, had such amount ready in money at the commencement of his second term to pay to himself as his own successor.

The appellants also filed pleas of payment, to which the appellee replied by way of confession and avoidance, alleging that such payments were made for moneys derived by Rogers from the second term of his office. We think the demurrer which was filed to this reply should have been sustained. The technical legal title to the money, which Rogers received by virtue of his office, was in him. *Linville v. Leininger*, 72 Ind. 491. And if he used money derived from the second term to the payment of his liability of the first term, the loss, if any, would fall upon the sureties of the second bond. *Cook v. State, ex rel.*, 13 Ind. 154. But it turned out in evidence that Rogers did not specifically apply any of the credits with which he was entitled either to his first or second term liability. The law, therefore, under the special findings of facts, makes the application of these credits, and as it is manifest that such application is in no way affected by the reply in question, it follows that the overruling of the demurrer thereto was a harmless error.

After the jury was sworn and some evidence had been introduced by the appellee, the court permitted the latter to file an amended third paragraph of reply, and the trial proceeded without the jury being resworn. The third paragraph of the reply, as it stood prior to the amendment, is not in the record by bill of exceptions or order of court. The amendment carried it out of the record. 1 Works Pr., section 711. And a bill of exceptions or an order of court was necessary to

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bring it back into the record. An amendment may be made to a pleading within the discretion of the court after the trial has begun. Where such amendment does not change the issues, it is not necessary to reswear the jury. *Knowles v. Rex-roth*, 67 Ind. 59. As the record does not disclose in what respect the amended third paragraph of reply differed from the paragraph of which it became a substitute, we are not able to say that the court abused its discretion in permitting it to be filed, or that it made any change in the issues.

The appellants, in their motion for a new trial, assigned as various causes therefor the exclusion of evidence offered to be introduced by a number of witnesses who are named. We fail, however, to find from the record that the evidence referred to was excluded. On the contrary, it appears to have been admitted.

The appellants offered, but were not permitted, to introduce in evidence the annual settlements made by Rogers with the county board during his second term, namely, in June, 1880, and June, 1881. These, as already observed, would have tended to show that he charged himself in his second term with the amount for which he was liable at the close of his first, but they would not have shown, nor have been any evidence, that at the end of his first term he had on hands, to pay to himself as his own successor, the amount for which the evidence and the special finding of the jury establish that he was then in default. We can not see how it is possible that the introduction in evidence of the annual settlements made with the county board during Rogers' second term could have changed the result of the trial. These would not have shown, nor tended to show, that the amount for which he was accountable and in default at the close of his first term was less than that found by the jury in answer to the interrogatory addressed to them upon that point. It is therefore manifest that the exclusion of these settlements as evidence was harmless, in view of the circumstances of the case.

Appellants complain that one of their counsel, in his ar-

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gument to the jury, was not permitted to discuss how the payment of \$4,000 made by Rogers to his successor should be applied. But there being no question in controversy as to the source from which the money came with which such payment was made, its application was simply a question of law, the argument of which should have been to the court, and not to the jury.

For the purpose of showing the amount of Rogers' liability at the close of his first term, appellee introduced in evidence his last settlement in that term made with the county board in June, 1879. This showed the balance for which he was then accountable. To this was added his subsequent receipts, less disbursements, up to the close of his first term, on August 21st, 1879. The amounts of such subsequent receipts and disbursements were shown by the evidence of competent witnesses from an examination of the treasurer's books. This evidence was objected to. We think that it was properly received. Had all the records, from which the witnesses obtained the facts to which they testified, been put in evidence, they would have served rather to confuse than to enlighten a jury. The evidence of competent witnesses who had examined the records, and who were able to give the jury an intelligible explanation of them, served a much better and satisfactory purpose than would the records themselves, if put in evidence. Such evidence of witnesses can not be regarded as contradicting the record. It simply presents so much of the record as is pertinent, in a shape to be easily understood and comprehended. Witnesses so testifying, to give their evidence weight, should be prepared to corroborate every statement by references to the records, in the presence of the jury, whenever either party desires it either in the examination or cross-examination of such witnesses.

The giving of certain instructions and the refusal to give others were assigned as causes for a new trial.

We think there was error in some of the instructions given with regard to the application of credits, but as the jury in

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answer to interrogatories found the facts specially, the error may be corrected without necessarily reversing the judgment. As already seen, the judgment, based on the general verdict, was for \$717.73 more than it should have been.

Our conclusion is, and it is so ordered, that if the appellee shall, within sixty days, remit said sum of \$717.73, as of the date of the judgment, April 1st, 1882, the judgment will be affirmed, otherwise reversed, at appellee's costs.

Filed Dec. 30, 1884.

No. 11,927.

DOLKE v. THE STATE.

CRIMINAL LAW.—*Sufficiency of Evidence.*—*Supreme Court.*—In criminal as well as in civil causes, there must be an absolute failure of evidence on some material point to authorize the Supreme Court to reverse the judgment merely on the evidence.

SAME.—*Sale of Intoxicating Liquor to Minor.*—*Evidence.*—*Case Overruled.*—

Where evidence is given on the trial, on May 1st, 1884, of a defendant charged with a sale and giving away of intoxicating liquor to a minor, that the prosecuting witness "will be twenty-one years old the first day of August next," the court is justified in finding from the evidence that on the 15th day of November, preceding the day of trial, the witness was under twenty-one years of age. On this point *Meyer v. State*, 50 Ind. 18, overruled.

From the Knox Circuit Court.

L. A. Meyer and *B. M. Willoughby*, for appellant.

F. T. Hord, Attorney General, *A. J. Padgett*, Prosecuting Attorney, and *W. B. Hord*, for the State.

Howk, J.—In this case the appellant was indicted, tried and convicted for an unlawful sale and giving away of intoxicating liquor to one Clinton Robinson, who was then and there a person under the age of twenty-one years. The indictment contained two counts, of which the first charged an unlawful sale, and the second charged an unlawful giving

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127	235
99	229
139	533

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away, of intoxicating liquor. Upon the trial the court found generally that the appellant was "guilty of the charge in the indictment," and assessed his punishment at the lowest fine fixed by the statute for either of the offences charged in the indictment. Section 2094, R. S. 1881. Over appellant's motion for a new trial the court rendered judgment against him in accordance with its finding.

The overruling of his motion for a new trial is the only error assigned by the appellant in this court. It is earnestly insisted by appellant's counsel that the finding of the court was not sustained by sufficient evidence, and was, therefore, contrary to law. The point is made that the evidence fails to show a sale of intoxicating liquor by the appellant to the prosecuting witness. Upon this point appellant's counsel seem to have overlooked some of the evidence appearing in the record. Margaret Schaffer testified: "I am a sister of Clint. Robinson. * * * On the 15th day of November, 1883, just as I was stepping into Dolke's saloon, I saw Clint., my brother, take a drink of whiskey. Dolke was behind the bar. My brother took the glass off of the counter to drink. It was a little glass, and the liquor looked like whiskey; that's the only way I know it was whiskey. The glass was too little for a beer glass. My brother paid for the drink. He is not twenty-one years old."

We think this evidence was abundantly sufficient to justify the court in finding the appellant guilty of the offence charged in the first count of the indictment; at least we can not disturb the finding of the trial court upon the evidence, although some of the testimony introduced might raise a doubt in our minds in regard to the appellant's guilt. It is settled by the decisions of this court that there must be an absolute failure of evidence to sustain the finding or verdict on some material point before we would be authorized to reverse the judgment on the evidence. *Cox v. State*, 49 Ind. 568; *Kelly v. State*, 64 Ind. 326; *Siebert v. State*, 95 Ind. 471, on p. 479; *Murphy*

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v. *State*, 97 Ind. 579. There is no such failure of evidence in the case we are now considering.

Appellant's counsel also claim that the evidence failed to show that at the time of the sale the prosecuting witness was under the age of twenty-one years. Upon this point the father of the witness testified as follows: "I am the father of Clint. Robinson. He will be twenty-one years old the 1st day of August next." This case was tried on the 1st day of May, 1884, and the offence charged was alleged and proved to have been committed on the 15th day of November, 1883. There was no conflict in the evidence in relation to the age of the prosecuting witness, and it showed conclusively, we think, that at the time of the sale, and of the trial of this cause, he was under twenty-one years of age. But counsel say that evidence that the alleged minor will be twenty-one years old next August is not conclusive that he was under twenty-one years of age at the time of the alleged sale, and they cite *Meyer v. State*, 50 Ind. 18, which seems to support their position. Upon the point now under consideration the case cited was criticised and condemned in the recent case of *Ehlert v. State*, 93 Ind. 76, and must now be regarded as overruled.

Finally, it is urged by appellant's counsel, that the sale was justified, because made in the reasonable and honest belief that the alleged minor was of full age. That was a question for the consideration of the trial court, which had much better facilities for its determination than we can possibly have. We can not disturb its decision of that question upon the evidence.

We find no error in the record which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed Dec. 31, 1884.

Sharpe v. Graydon.

No. 10,866.

SHARPE v. GRAYDON.

CONTRACT.—Breach.—Measure of Damages.—Mortgage.—Husband and Wife.—

Suit by a married woman, alleging that she had, at the instance of her husband and the defendant, mortgaged her lands to secure a loan of \$3,000, upon an agreement with the defendant that he would receive the money and apply \$1,000 of it in payment of an older mortgage on part of the same lands, given to secure her husband's debt, and would pay \$2,000 to her husband; and for breach, that the defendant received the money, did not apply said \$1,000 as agreed, but converted it to his own use, by reason whereof she lost her land. It appeared in evidence that \$300 had been paid by her husband upon the older mortgage.

Held, that the measure of damages could not exceed \$700 and the interest thereon.

*SAME.—Evidence.—*In such case it is error to exclude evidence by the husband as a witness to the effect that the loan was made with a view to other purposes than the payment of the prior mortgage; so, also, to exclude evidence showing that the husband, and not the defendant, nine years before the trial, received the borrowed money, and that he disposed of the whole of it, paying \$300 on the older mortgage.

*WITNESS.—Evidence.—Practice.—*The refusal to permit a party to put a question to his own witness is not available error, where the court has not been informed of the evidence expected to be elicited by the answer.

From the Marion Circuit Court.

J. E. McDonald, J. M. Butler and A. L. Mason, for appellant.

S. Claypool and W. A. Ketcham, for appellee.

FRANKLIN, C.—Appellee sued appellant for an alleged breach of a parol agreement in relation to the execution of a mortgage upon her real estate.

The substance of the complaint is as follows: Appellee, being the owner of certain real estate, in 1868 mortgaged the same to secure a note executed by her husband to Anna E. Browning for \$1,100. On June 10th, 1873, said note being unpaid, at the instance of her husband and said defendant Sharpe, she executed a mortgage to one George Randall, on the east half of said real estate, to secure a loan of \$3,000, then and there agreeing with the defendant "that he would

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receive the money so borrowed by her husband upon said mortgage, and after paying \$2,000 thereof to her husband would apply the residue, to wit, the sum of \$1,000, to the payment, discharge and satisfaction of said mortgage to said Anna E. Browning." That upon said agreement she united in said mortgage, and said defendant thereupon received the proceeds of said loan. And that said defendant did not apply said sum of \$1,000, or any part thereof, to the payment and discharge of said indebtedness to said Browning, but converted the same to his own use, and has refused to pay the same to said plaintiff, or any part thereof. By reason thereof, and the existence of said mortgage, said premises were wholly lost to her. Wherefore she demanded judgment for \$1,600 damages.

An issue was formed by a general denial. There was a trial by jury; verdict for the plaintiff for \$1,540, and over a motion for a new trial judgment was rendered upon the verdict.

The error complained of is in overruling appellant's motion for a new trial. The reasons stated for a new trial are: The verdict is contrary to law, and is not sustained by sufficient evidence, the damages are too large and are excessive, error of law occurring at the trial, in excluding certain testimony of George Ryer, striking out parts of deposition of William M. Graydon, giving to the jury certain instructions, and the refusal to give certain other instructions asked by the defendant.

There is a square conflict in the evidence as to there being any agreement to apply any part of the \$3,000 loan from Randall to the payment of the Browning debt. But it was proved, and admitted upon the trial, that \$300 of the proceeds of the Randall loan was applied on the Browning mortgage.

The complaint at most only charges the defendant with the conversion to his own use of the \$1,000 that was to be applied on the Browning mortgage. If no part thereof had been paid upon the Browning mortgage, and the complaint be true, the plaintiff could only recover the \$1,000, with six per cent. interest, from date of Randall's mortgage to date of

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judgment. But the evidence shows, and the fact is admitted, that \$300 of said proceeds were paid upon the Browning mortgage on the 17th day of June, 1873, seven days after the execution of the Randall mortgage. But it is insisted that the husband William Graydon paid the \$300, that the defendant, Sharpe, had previously converted it to his own use, and notwithstanding the husband afterwards paid it on the Browning mortgage, the defendant should still be held liable to pay it to her.

It makes but little difference to her which made the payment, her property was relieved from the lien of the mortgage to the extent of the payment, and as to that the property was not lost by her. Although there might at the time have been a breach of the agreement and a conversion of the proceeds, yet, if the money was afterwards paid, only nominal damages could be recovered for the breach. 2 Addison Torts, 462; 2 Sedg. Dam., pp. 413 and 415. Hence the most that could have been recovered under the allegations of the complaint, the proof and the admissions of appellee, is the \$700, with interest at six per cent. from the 10th day of June, 1873, to the 2d day of June, 1882, the date of the judgment, say nine years, making together the sum of \$1,078. We think the damages assessed at \$1,540 are excessive.

It is further insisted that the court erred in excluding certain testimony of George Ryer. The question objected to, and to which the objection was sustained, is: "Do you know to whom the loan was made?" This was an introductory question, the answer to which, if made in any way, could not, without being followed by an additional question, or questions, have possibly affected the merits of the case. There was no attempt to further pursue the inquiry or inform the court as to what facts were intended to be proved by the testimony. There is no available error in the exclusion of this testimony.

It is further insisted that the court erred in striking out parts of the deposition of William M. Graydon. But it is claimed by appellee that this objection is waived by the record

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showing that the parts said to be stricken out were read to the jury.

Bill of exceptions No. 1 contains the parts struck out and replaces them properly in the record under the signature of the judge.

Bill of exceptions No. 2, containing the evidence given to the jury, also contains the questions and answers, the striking out of which are complained of by appellant, with the following marginal note opposite each: "Stricken out on motion of plaintiff, as shown by bill of exceptions."

We think this error of the compiler of the second bill of exceptions, in including these questions and answers therein, fully explains itself. And if it can be considered that these questions and answers were read to the jury, it must be considered that they were then struck out by the court; for the second bill is regularly authenticated by the signature of the court as well as the first.

We think that the record shows that said questions and answers were not read to and left before the jury for their consideration, and the objections and exceptions to their exclusion as evidence are properly a part of the record.

The eighth question and answer which were struck out read as follows: "What representations, if any, were made by you to induce your wife to join with you in said mortgage to Randall? Answer. My representations were that I had to meet and pay a deficit of about \$1,850, owing by me to the P., C. & St. L. R. R. Co., growing out of my account as freight agent, and that I had to make some repairs and improvements on our homestead dwelling, and some other little matters."

Under the charge in the complaint that the husband and the defendant induced her to sign the mortgage to Randall under an agreement that \$1,000 of the proceeds should be paid upon the Browning mortgage, we think this question and answer were relevant, material and competent, and that the evidence contained therein, in connection with the other evidence in the case, should have gone to the jury for their consideration.

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Question and answer No. 13, which were struck out, read as follows: "State as nearly as you can the exact disposition by you of said \$3,000 so received by you? Answer. To my best recollection I disposed of said \$3,000 as follows: About \$1,850 paid to said railroad company, as heretofore stated; \$300 interest on Browning note and mortgage; about \$400 for addition to the house; about \$200 paid bills of my wife; balance in sundry accounts that I can not now state."

Considering that this transaction occurred some nine years before the trial, and over seven years before suit was commenced, we think the action of the parties about the time of the transaction would tend strongly to show the construction that they themselves had placed upon any agreement that they may have made, or to disprove the making of any such agreement.

It was competent for the defendant to prove that the husband received and disposed of the proceeds, and that \$300 of the same were applied upon the Browning mortgage. We think the court erred in striking out this part of the deposition.

It is further insisted that the court erred in refusing to give instructions asked by appellant, and in giving instructions of its own motion. As the judgment must be reversed for the errors heretofore stated, and the same instructions may not be repeated in a subsequent trial, we deem it unnecessary to prolong this opinion by setting out, discussing and deciding upon the instructions.

The court erred in overruling the motion for a new trial, for which the judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things reversed, at appellee's costs, and that the cause be remanded, with instructions to the court below to grant a new trial, and for further proceedings.

Filed Nov. 13, 1884. Petition for a rehearing overruled Feb. 20, 1885.

Myers et al. v. Lawyer et al.

No. 11,734.

MYERS ET AL. v. LAWYER ET AL.

AGREED CASE.—*Jurisdiction.*—*Affidavit of Facts.*—*Practice.*—In order to confer jurisdiction upon the court to hear and determine an agreed case, the agreed statement of facts must be supported by an affidavit that the controversy is real and the proceedings in good faith to determine the rights of the parties.

SAME.—*Transcript.*—*Supreme Court.*—Upon appeal from a judgment rendered in such case, the transcript must embrace a copy of such affidavit; otherwise the record presents no question for decision.

SAME.—*Statement of Clerk.*—In such case the statement of the clerk that such affidavit was filed will not supply such omission.

From the Hamilton Circuit Court.

T. J. Kane and *T. P. Davis*, for appellants.

G. Shirts and *W. R. Fertig*, for appellees.

BEST, C.—There are no pleadings in this cause. It was submitted and determined as an agreed case, under section 553 of the R. S. 1881. This section authorizes parties "to submit any matter of controversy between them to any court that would otherwise have jurisdiction of such cause, upon an agreed statement of facts to be made out and signed by the parties, but it must appear by affidavit that the controversy is real and the proceedings in good faith, to determine the rights of the parties." This section authorizes the determination of such controversy upon an agreed statement supported by the requisite affidavit, without pleadings. The record in this case contains the statement, but no affidavit accompanies the statement. This was necessary, as in the absence of an affidavit the record presents no question for decision by this court. This has heretofore been decided. *Sharpe v. Sharpe*, 27 Ind. 507; *Manchester v. Dodge*, 57 Ind. 584; *Godfrey v. Wilson*, 70 Ind. 50.

The clerk in this cause prefaced a copy of the agreed statement of facts with the recital that one of the attorneys had filed the requisite affidavit, but the affidavit itself is not in the

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record, and its existence can not thus be shown. The affidavit is an essential paper in the cause, and it is just as necessary to procure a transcript of it in order to present any question to this court, upon an agreed case, as to procure a transcript of the agreed statement of facts. Without an affidavit the court in such cases has no jurisdiction, and it is therefore essentially necessary that the record shall contain the affidavit as well as the agreed statement of facts. In this condition of the record, no question is presented, and, therefore, the judgment can not be disturbed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby affirmed, at the appellants' costs.

Filed Dec. 13, 1884. Petition for a rehearing overruled Feb. 14, 1885.

No. 11,555.

TULL, TREASURER, v. THE STATE, EX REL. GLESSNER.

CIRCUIT COURT.—*Power to Appoint Attorneys to Assist Prosecuting Attorney.—Liability of County.*—The circuit court has inherent discretionary power to appoint attorneys to assist the prosecuting attorney in criminal causes, and to allow compensation payable out of the county treasury, nor will its action be reviewed save in cases where a clear abuse of discretion appears.

From the Shelby Circuit Court.

T. B. Adams and L. T. Michener, for appellant.

O. J. Glessner, D. L. Wilson and A. F. Wray, for appellee.

ELLIOTT, J.—A prosecution was instituted against Edward Kennedy for the premeditated and malicious murder of Albert McCorkle, sheriff of Shelby county, and eight of the principal lawyers of the county were employed by Kennedy to conduct his defence. The prosecuting attorney asked the court to appoint counsel to assist him in conducting the prosecution, and this request was granted. The relator and

99	238
182	320
99	238
148	428
99	238
153	373
99	238
171	639

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David L. Wilson were appointed to assist the prosecutor, and the former entered upon the duty assigned him and did aid in prosecuting Kennedy. In January, 1884, the court ordered that an allowance of \$300 be made to the relator as compensation for the services rendered by him, and a certified copy of the order was issued and delivered to the auditor of the county who at once drew his warrant upon the county treasurer, the appellant, for the amount specified in the order of the court. Payment of the warrant was demanded of the treasurer and he refused to pay it, whereupon the relator sued out a writ of mandate commanding payment. The case comes to us upon the ruling of the court on the demurrer of the appellant to the alternative writ issued at the suit of the relator.

It is settled, without substantial diversity of judicial opinion, that the trial court has power to appoint counsel to assist a prosecuting attorney in the trial of a prosecution for a criminal offence. *Siebert v. State*, 95 Ind. 471; *Wood v. State*, 92 Ind. 269; *Dukes v. State*, 11 Ind. 557; *State v. Wilson*, 24 Kan. 189; S. C., 36 Am. R. 257; *Hopper v. Com.*, 6 Grat. 684; *Shelton v. State*, 1 Stew. & P. 208; *United States v. Hanway*, 2 Wall. Jr. 139; *People v. Blackwell*, 27 Cal. 65; *State v. Bartlett*, 55 Me. 200; *Edwards v. State*, 47 Miss. 581; *State v. Russell*, 26 La. An. 68; *Jarnagin v. State*, 10 Yerger, 529.

The interests of public justice require that the representatives of the State shall have power to invoke professional assistance for the prosecuting attorney when the occasion demands it. To deny the right of the prosecutor to needed assistance might often lead to the defeat of justice and the escape of offenders who justly merit punishment. The accused is at liberty to summon to his assistance the most learned lawyers and ablest advocates of the bar, and bare justice requires that the State should be granted a corresponding right to call to the aid of its prosecuting attorney counsel learned in the law. The forensic contest should be fought

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with something like a just equality of opposing forces. Careful as the State is of the rights of those accused of crime, it does not yield the right to fairly oppose the array of talent summoned to the assistance of the accused. It is within the power of the representatives of the commonwealth to call to the relief of the prosecutor such professional aid as will prevent the defeat of justice, and will place the prosecution and the defence upon something like an equal footing.

The people do not surrender the right to employ just means of prosecuting criminals by choosing an officer and charging him with the special duty of prosecuting the pleas of the State. In committing to the prosecuting attorney the duty of prosecuting the violators of law, the community does not avow that it will not employ counsel to assist him when the occasion demands.

The court in which a charge preferred by indictment is pending is in a situation to correctly judge whether the case is one in which the prosecutor's request for professional assistance should be granted or denied. In no other officer or tribunal can the power of determining when assistant counsel shall be called be more appropriately lodged than in the court in which the trial takes place. The judge has adequate means of knowledge, and is solemnly charged with the duty of securing justice to the defendant and to the State. Better than any one else is he prepared to intelligently decide the question, for he knows the gravity of the charge as well as the power and influence of the prisoner's counsel, and knows, too, the need the attorney of the State has for professional assistance. The court having jurisdiction of felonies is not organized to acquit or to convict persons accused of crime, but to see that, if innocent, they have safe deliverance, and, if guilty, that they be justly punished. It is evident that the duty can not be efficiently discharged unless the court is invested with authority to call counsel to the assistance of the prosecutor when the interests of justice require it.

The court having cognizance of prosecutions for felonies is

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one of general superior jurisdiction, and all reasonable presumptions are indulged in favor of the legality of its order and judgment where there are no countervailing circumstances. Ruled by this presumption, we must adjudge that the case before us was one in which the interests of justice required that the request of the prosecuting attorney for assistance be granted.

The decisions denying the authority of the county commissioners to employ counsel to assist in the prosecution of offenders, are pressed upon our attention, but it is quite clear that these decisions do not govern this case. The court which ordered the relator to assist the prosecutor is one of general jurisdiction, charged with the duty of administering the law and securing for the commonwealth and for the defendant a fair trial, whereas the board of commissioners is an inferior statutory tribunal, without any jurisdiction in prosecutions for criminal offences.

Assuming that the circuit court had authority to direct the employment of counsel to assist the prosecutor, there can be no difficulty in solving the question of the right to compensation. The State does not expect a man's service without fair compensation, nor can it, without violating the Constitution, compel an attorney to render services gratuitously. When the court directs a member of its bar to assist in the prosecution of a person accused of crime, it requires of him the bestowal of time, learning and labor, and these are things of value, for which justice, as well as the paramount law, requires that reasonable compensation shall be made. We have decisions establishing the principle upon which this conclusion rests, and lending strong support to the proposition already stated, that the circuit court had power to grant the petition of the prosecuting attorney. In *Webb v. Baird*, 6 Ind. 13, this court held that the circuit court had the power to appoint an attorney to defend a pauper, although there was no statute authorizing the appointment, and held, also, that the attorney appointed by the court was entitled to compensation.

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The case named has received approval in *Board, etc., v. Wood*, 35 Ind. 70, *Kerr v. State, ex rel.*, 35 Ind. 288, *Gordon v. Board, etc.*, 44 Ind. 475, and *Gordon v. Board, etc.*, 52 Ind. 322. In the latter case it was said: "In this State, courts are created by the Constitution and acts of the General Assembly (Const., art. 7, sec. 1), and, when once established and their jurisdiction defined, they have the inherent power to perform the duties required of them, whether expressly granted or necessarily implied." The doctrine that all courts possess inherent powers has found expression and enforcement in many decisions of this court. *Curtis v. Gooding, ante*, p. 45; *Woods v. Brown*, 93 Ind. 164, see p. 168 (47 Am. R. 369); *Earle v. Earle*, 91 Ind. 27; *Little v. State*, 90 Ind. 338; S. C., 46 Am. R. 224; *Sanders v. State*, 85 Ind. 318; S. C., 44 Am. R. 29; *Nealis v. Dicks*, 72 Ind. 374.

As it is the duty of the trial court to administer justice by securing an impartial trial to the State and to the accused, it must possess the implied power to adopt means to effect that object. If, in the judgment of the court, an impartial trial can not be had without granting the prosecuting attorney the assistance which he asks, then the court necessarily possesses the implied power to grant what the officer requests. It can not be possible that a trial court is bound to permit a trial to proceed when it is informed that in order that it may be a just one the prosecutor needs professional assistance. The decisions to which we have referred do not, it is true, in terms affirm that counsel may be employed to assist in the prosecution of a person accused of crime, but they do establish a principle which directly leads to that conclusion. If there is a right to employ and pay counsel to defend, and if this right is inherent in the court, then it must follow that the State has a similar right to have counsel employed and paid to assist in the prosecution. Decisions rest, or, at least, should rest, on principle, and the principle which sustains the decisions in favor of the defendant, will, with equal strength, sustain a like decision in favor of the State.

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The rule deducible from the decisions and principles of which we have spoken is, that a discretionary power, both as to the employment of assistant counsel and the amount of their compensation, is vested in the trial court. The appellate courts will not interfere with the reasonable exercise of this discretionary power, although they will review and rebuke an abuse of it. In the case at bar there is nothing showing an abuse of discretion; on the contrary, the power seems to have been wisely exercised.

The appellant's counsel contend that even if the court had power to direct the employment of assistant counsel, and to award compensation, still the writ should not have been granted, because, as they assert, the compensation should be paid by the State, and not by the county. The cases of *Webb v. Baird*, *supra*, *Board, etc.*, v. *Wood*, *supra*, *Kerr v. State*, *ex rel.*, *supra*, and *Gordon v. Board, etc.*, *supra*, establish a principle that is decisively against them, and the question may well be regarded as no longer an open one. It is true that the point here pressed was not distinctively made in those cases, but it is, nevertheless, involved and was decided. If the question were an open one, the decision should be that the county must pay the expense incurred in prosecuting persons who commit felonies within its limits. The policy of the common law was to make the inhabitants of the locality apprehend and punish criminals, and it is a wise and salutary one. By the common law the hundredors were bound to make hue and cry after the felon, and if they took him they stood excused, otherwise they were liable to the person who suffered injury from a felony committed in the hundred. 3 Bl. Com. 160. There are obvious and forcible reasons why the locality where a crime is committed should bear the expense of prosecuting the law-breakers, but, as the question is put at rest by our decisions, further discussion is unnecessary.

Judgment affirmed.

Filed Dec. 31, 1884.

 Adams v. The State.

No. 12,059.

ADAMS v. THE STATE.

CRIMINAL LAW.—*Jeopardy.—Discharging Jury.*—If, after a jury is empanelled and sworn, it be disclosed that a juror is incompetent because not a freeholder or householder, and the accused declines to object to the juror, and the court thereupon, of its own motion, discharges the jury, the accused has been once in jeopardy and should be released.

From the Huntington Circuit Court.

J. C. Branyan, M. L. Spencer, R. A. Kaufman and W. A. Branyan, for appellant.

G. W. Gibson, Prosecuting Attorney, *J. M. Hildebrand and C. W. Watkins*, for the State.

NIBLACK, J.—This was a prosecution by indictment against Joseph J. Adams, under section 2204, R. S. 1881, for selling a promissory note to the Citizens Bank of Huntington, at Huntington, Indiana, knowing that one of the signatures to the note had been obtained by false pretences. Upon a former appeal to this court the indictment was held to be sufficient, and the judgment below quashing it was reversed. *State v. Adams*, 92 Ind. 116.

After the cause was remanded, and issue had been formally joined by the entry of a plea of not guilty, a panel of jurors was called to try it. A man known as Luther Crandall was one of the persons thus called to serve as jurors in the cause. Crandall was not specially interrogated as to his qualifications as a juror, but others called with him were so interrogated in his presence and hearing. Before the jury were sworn the court inquired whether all were either freeholders or householders of the county, to which there was a general response in the affirmative. After the jury were sworn, but before any statement of the case had been made to them, and before any further proceedings of any kind had been had, Crandall informed the court that he had, by inadvertence, incorrectly answered the court's inquiry as to some of his qualifi-

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168	312
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cations as a juror; that he was, in fact, neither a freeholder nor a householder. The court then inquired of the defendant whether he objected to Crandall as a juror on account of the information which he, Crandall, had thus communicated to the court, to which the defendant, through his attorneys, responded, "We decline to change the jury." The court, thereupon, over the objection and exception of the defendant, discharged the jury. The defendant then moved that he be discharged and permitted to go hence without day, upon the ground that he had been once placed in jeopardy, and that he ought not, for that reason, to be longer held to answer the charge which a jury had been empanelled as above to try. But the court overruled the motion and proceeded to empanel another jury to try the cause, which resulted in finding the defendant guilty as charged, and in sentencing him to the State's prison for a term of two years.

It is a well settled rule that all objections to the competency of a juror are waived by neglecting to use due diligence in urging them as well as by the failure of the party, afterwards complaining, to avail himself of such objections at the proper time, after they have come to his knowledge. *Kingen v. State*, 46 Ind. 132; *Gillooley v. State*, 58 Ind. 182; *Patterson v. State*, 70 Ind. 341; 1 Bishop Crim. Proc., section 946.

That rule applies especially to that class of disqualifications which arise from a proposed juror not being either a freeholder or householder, or a voter of the county. It is also well settled that when the ordinary forms of law have been complied with, jeopardy attaches when the jury are sworn. 1 Bishop Crim. Law, section 1014; 1 Bishop Crim. Proc., section 961; *Maden v. Emmons*, 83 Ind. 331.

When jeopardy has begun, and the jury are unnecessarily and without the consent of the prisoner discharged, such a discharge of the jury is the equivalent of an acquittal, and the prisoner thereby becomes entitled to exemption from further prosecution for the same offence. *Wright v. State*, 5

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Ind. 290; *Wright v. State*, 7 Ind. 324; *Maden v. Emmons*, *supra*.

On that subject Bishop in his work on Criminal Law, vol. 1, section 1037, says: "The general doctrine, let it be repeated, is, that if, after the jeopardy already explained has attached, the judge discharges the jury without the prisoner's consent, the prisoner is entitled to be set at liberty, and he is not to be again brought into danger for the same offence."

As deducible from the authorities herein above cited, Adams, the appellant in this case, waived all objection in the first instance to Crandall's qualifications as a juror by failing to make any inquiry upon the subject at the proper time, and when the action afterwards taken by the court resulted in bringing out the fact that Crandall was neither a freeholder nor a householder, he still made no objection on that account. In all such proceedings a failure to object is construed as implying consent, and the declination of the appellant to "change the jury" ought, under the circumstances, to have been interpreted as meaning that he was willing to proceed with the jury as it was then constituted. There was, consequently, no sufficient cause for discharging the jury at the time it was discharged, and the action of the court in that respect, having been without the consent of the appellant, either express or implied, was the equivalent of an acquittal of the offence which the jury were empanelled to try.

It follows that the court below erred in overruling the appellant's motion for his discharge from his arrest upon the indictment against him, and that all subsequent proceedings based upon that indictment were, in consequence, erroneous.

The judgment is reversed, and the cause remanded with instructions to the court below to discharge the appellant.

The clerk will give the necessary notice for the return of the prisoner to the custody of the sheriff of Huntington county.

Filed Dec. 30, 1884.

Barren Creek Ditching Company *et al.* v. Beck *et ux.*

No. 11,558.

BARREN CREEK DITCHING COMPANY ET AL. v. BECK ET UX.

DRAINAGE.—*Repeal of Statute.*—The act concerning drainage, of March 10th, 1873, has not been repealed by the act of March 13th, 1879, as to corporations organized prior to the latter date.

CORPORATIONS.—*Dissolution.*—Until a corporation once organized has been adjudged dissolved, in a direct proceeding for that purpose, instituted by the State, its existence can not be questioned by a private person.

HUSBAND AND WIFE.—*Tenants by Entireties.*—*Judgment.*—*Foreclosure of Lien.*—A judgment foreclosing a lien against lands held by husband and wife as tenants by entireties, is not necessarily void; it would be valid if both were parties thereto.

From the Grant Circuit Court.

J. L. Custer, for appellants.

A. Steele, R. T. St. John and G. W. Harvey, for appellees.

HAMMOND, J.—Suit by the appellees against the appellants to enjoin the collection of a judgment. The complaint was in two paragraphs, to each of which appellants demurred for want of facts. The demurrer was sustained to the first and overruled to the second paragraph. There was an answer in denial, trial by jury, verdict for appellees, and judgment thereon over the appellants' motion for a new trial. Exceptions were taken to the overruling of the demurrer to the second paragraph of the complaint, and the overruling of the motion for a new trial, and these rulings are assigned for error.

The facts stated in the second paragraph of the complaint were, substantially, as follows: That appellees were the owners of certain described lands which had been conveyed to them as husband and wife; that after such conveyance the Barren Creek Ditching Company, a corporation organized under the the drainage law of 1873, procured, in 1875, benefits to be assessed on said lands for the construction of a ditch, which was completed before January 1st, 1878; that at the February term of the trial court, in the year 1879, said company recovered judgment on such assessment against the appellant Christian Beck in the sum of \$406, and the foreclosure of

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135	182
136	184
136	210

99	247
170	398

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the lien thereof against said lands, but that no judgment was rendered against the appellant Christina Beck; that no steps were taken to collect said judgment until September 21st, 1882, when an execution was caused to be issued thereon and placed in the hands of the appellant, the sheriff of Grant county, who levied it upon said lands, and was proceeding to have the same sold at sheriff's sale, etc.; that more than three years before the issue of the execution said company was dissolved by the repeal of the drainage law of 1873 by that of 1879; that said company, on January 1st, 1878, failed to meet or to transact any business, and abandoned its organization, and never thereafter transacted any business as a ditching company; and that no receiver was ever appointed to wind up its business. "Wherefore plaintiffs say that said pretended corporation has no corporate existence, nor any authority to enforce the judgment or collection of said judgment, or any part thereof, and that said execution and decree were issued by the clerk without authority or right."

The theory of the complaint is (1) that the ditching company was dissolved by the repeal of the act of the Legislature under which it was organized, and (2) that its rights, privileges and franchises were forfeited by non-user for more than three years prior to the issue of the execution.

The act under which the appellant, the Barren Creek Ditching Company, was organized, was approved March 10th, 1873. Acts 1873, p. 165; 1 R. S. 1876, p. 418. The next drainage law passed by the Legislature was the act approved March 9th, 1875. Acts 1875, p. 97; 1 R. S. 1876, p. 428. By the 22d section of the last named act it was expressly provided that it should "not be so construed as to repeal any law of this State now in force to encourage the construction of levees, dikes and drains, and to enable the owners of wet lands to drain and redrain the same, but such" (provisions of this act) "shall be in addition thereto."

The twenty-first section of the drainage law, approved March 13th, 1879 (Acts 1879, p. 234), relied upon by the

appellees as repealing the act of 1873, while expressly repealing the same, contains this *proviso*: "That in all cases where application has been made or any proceedings had under existing laws of the State, the same shall not be affected by the provisions of this act, but the same may be carried on to completion, and all assessments collected, unaffected by the provisions of this act."

The above saving clause was, we think, amply sufficient to protect the rights of the ditching company in the decree foreclosing the lien of the assessments upon appellees' lands.

The eleventh section of the drainage law, of April 8th, 1881, and the thirty-fifth section of the drainage law, of April 21st, 1881, contains, respectively, a saving clause as to pending proceedings under prior laws. Acts 1881, pp. 404, 422. In addition to all this, section 248, R. S. 1881, which has been in force since July 2d, 1877, provides that "the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide; and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

It is plain, we think, that the right of the appellant, the Barren Creek Ditching Company, to enforce the collection of the judgment in question is not affected by any act of the Legislature.

Whether the facts alleged in the second paragraph of the complaint are sufficient to authorize, in a direct proceeding, a decree of court declaring a forfeiture of the rights and franchises of the ditching company, on account of non-user, need not be decided. No such decree is averred to have ever been rendered. The non-user or mis-user of the franchises of a corporation does not of itself work a forfeiture. The forfeiture takes effect only when judicially determined in a direct proceeding, instituted for that purpose. A cause of forfeiture which has not been judicially declared in a direct

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proceeding can not be taken advantage of collaterally. The State alone has the right to insist upon a forfeiture, and it may waive this right. *John v. F. & M. Bank*, 2 Blackf. 367 (20 Am. Dec. 119); *Covington, etc., Plank Road Co. v. Moore*, 3 Ind. 510; *State v. Trustees, etc.*, 5 Ind. 77; *Brookville, etc., Turnpike Co. v. McCarty*, 8 Ind. 392; *Stoops v. Greensburgh, etc., Plank Road Co.*, 10 Ind. 47; *President, etc., v. Hamilton*, 34 Ind. 506; *White v. State*, 69 Ind. 273; *Board, etc., v. Hall*, 70 Ind. 469; *State v. Woodward*, 89 Ind. 110; *Logan v. Vernon, etc., R. R. Co.*, 90 Ind. 552. See, also, *Pierce R. R.*, pp. 11 and 12; *Field Private Corp.*, sections 493, 494.

The appellees' real estate, being owned by them as tenants by entireties, was not subject to the lien of a judgment or decree of foreclosure in an action in which the husband alone was a party. *Chandler v. Cheney*, 37 Ind. 391; *McConnell v. Martin*, 52 Ind. 434. The complaint alleges that a judgment was taken against the husband, but not against the wife. A personal judgment against the wife, or against the husband, was not necessary, and, in fact, was not authorized in actions to collect assessments under the drainage law of 1873. Section 24, 1 R. S. 1876, p. 425. If the wife was a party with her husband in the foreclosure proceedings, the judgment *in rem* would bind her, unless by the finding or judgment she was expressly or by necessary implication exempted from the operation of the decree. The complaint avers that there was a foreclosure of the lien of the assessments upon the appellees' lands. As there is no averment that the wife was not a party to the action, the second paragraph of the complaint makes no case for relief by injunction against the enforcement of the decree on account of appellees holding the lands as tenants by entireties. The complaint, in effect, charges that there was a personal judgment against the husband, but no such judgment against the wife. This might all be true, and yet the decree of foreclosure would be valid if she was a party to the action, which is not denied.

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The demurrer to the second paragraph of the complaint should have been sustained.

Appellees have assigned cross error in sustaining the demurrer to the first paragraph of the complaint. The first paragraph was not materially different from the second. The demurrer to it was correctly sustained.

Reversed, at appellees' costs, with instruction to sustain the demurrer to the second paragraph of the complaint.

Filed Dec. 31, 1884.

 No. 8519.

RIDGEWAY ET AL. v. LANPHEAR ET AL.

WILL.—Construction.—Intention of Testator.—The cardinal rule in the construction of wills is to ascertain and give effect to the intention of the testator, but, when purely technical terms are used, the technical meaning must be assigned them, unless the context clearly shows that the testator employed them in a different sense.

SAME.—Rule in Shelley's Case.—The rule in Shelley's case is a law of property in this State, but it will not be allowed to override the manifest and clearly expressed intention of a testator; mere negative restraining words, however, will not defeat its operation.

SAME.—Right of Testator to Assign Meaning to Words.—A testator has a right to assign a meaning to the words employed by him, and when that meaning is fully and clearly apparent, it will control and will take from the words their usual technical signification.

SAME.—Words "Heirs" and "Children."—The word "heirs" may be construed to mean children, when it clearly appears that the testator intended it to have that meaning.

SAME.—A devise of real estate by a testator to his son "during his natural life, and at his death to his children, if he have any, and if he have no children, or if there be no heirs of his body, then the real estate to his other heirs of his own blood equally, and if he die leaving a wife, his said wife to have a life-estate in said real property, said estate to terminate at her death," vests in the son, unmarried and childless at the testator's death, only a life-estate.

From the Vanderburgh Circuit Court.

J. M. Warren, P. Maier and G. Palmer, for appellants.

A. L. Robinson, for appellees.

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194	374
196	539
99	251
131	383
99	251
137	414
137	651
139	567
99	251
147	97
99	251
168	172
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ELLIOTT, J.—The contest in this case is upon the construction of the clause in the will of Mabrina Lanphear, which reads thus:

“Item 3d. I devise and bequeath unto my said son DeWitt H. Lanphear all my real estate, whatsoever, including lot seventeen (17), block two (2), in the Eastern Enlargement to the city of Evansville, Indiana, during his natural life, and at his death to his children, if he have any; and if he have no children, or if there be no heirs of his body, then the real estate to his other heirs of his own blood equally; and if the said DeWitt H. Lanphear die leaving a wife, his said wife to have a life-estate in said real property, said estate to terminate at her death or marriage after his death, and said real estate to be vested as above described.”

DeWitt H. Lanphear was unmarried and childless at the time of the testator's death.

The contention of the appellees is that the will gives to DeWitt H. Lanphear a life-estate and no more, and that if he should marry and have children, the remainder in fee would vest in them. The position of the appellants is that the will devises the fee to DeWitt H. Lanphear.

The authorities agree that the great purpose in construing wills is to ascertain and carry into effect the intention of the testator. In opposition to this fundamental principle, all technical rules give way. *Cooper v. Hayes*, 96 Ind. 386, *vide* opinion 395; *Downie v. Buennagel*, 94 Ind. 228; *South v. South*, 91 Ind. 221 (46 Am. R. 591). It is true that wills are to be construed by technical rules, when purely technical terms are used, and there is nothing in the language with which they are associated showing that the testator intended them to have any other meaning; but where it clearly and distinctly appears that the testator did not intend to employ the terms in their technical sense, then the courts will not give them that meaning; on the contrary, they will search for and affix to the terms employed the meaning which the testator intended they should receive.

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The rule in *Shelley's Case*, 1 Co. 88, is the law of this State, and, in all cases where the facts make it applicable, we must enforce it, although we may think there was not much reason for it at the time of its adoption, and none at all under the existing system of tenures and conveyances. But, in accepting the rule, we take it as construed and enforced by the courts which formulated and proclaimed it. Pressed by the evils wrought by the rule, and shocked by the great number of instances in which it operated to utterly overthrow the intention of the testator, these courts, centuries ago, affirmed that there existed an important difference between wills and deeds, and that the rule should not be so strictly enforced in the case of a will as in the case of a deed. It has long stood as the law that there is a material distinction between wills and deeds, and that the rule in *Shelley's Case* will not be allowed to override the manifest and clearly expressed intention of the testator, but that the intention will always be carried into effect if it can be ascertained. It is true that where the words used are such as bring the case within the rule, it will be given full force and effect, but where the context clearly shows that the testator annexed a different meaning, that meaning will be adopted, and the rule will not be allowed to frustrate his intention. The reason for applying a different principle to wills from that applied to deeds is given by a learned English author, who says: "In construing wills, courts have always borne in mind that a testator may not have had the same opportunity of legal advice in drawing his will as he would have had in executing a deed. And the first great maxim of construction accordingly is, that the intention of the testator ought to be observed." Williams Real Prop. (5th ed.) 212. In speaking of the course of the courts in averting the operation of the technical rule, the same author says: "But, in such cases, the courts, conscious of the pure technicality of the rule, were continually striving to avert the hardship of its effect, by laying hold of the most minute variations of phrase, as matter of exception." It is the right of a testator to assign his own meaning to the

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words he employs, and where this meaning clearly appears it will overcome the technical meaning usually affixed to the words. While the use of mere negating or limiting words can not control the force of the term "heirs," still the testator has a right to assign to it a meaning different from its technical one, and to make it mean children, grandchildren, or any kinsmen. 3 Jarman Wills, 115; Fearne Remainders, 188. This court has, in many cases, recognized the doctrine that there is a difference between wills and deeds, and that the rule in *Shelley's Case* is not so rigorously applied to wills.

In *Cleveland v. Spilman*, 25 Ind. 95, it was said: "But less strictness was required in the disposition of real estate by will, for the reason that when this mode of alienation was introduced, the rigor of feudal times was greatly worn out, and hence more liberality prevailed. * * * Upon the ground that a testator may often be without that professional assistance of which a party to a deed can always have time to avail himself, it was long ago held that the intention of the testator, as it could be collected from the whole will, more than from the exact legal import of the words employed, should be regarded. Cowp. 352."

In the early case of *Lutz v. Lutz*, 2 Blackf. 72, the court said, in speaking of a will: "This is not an instrument in which the intention of the maker must yield to any rigid principle of law. The intention of the testator, in such cases as the present, must prevail." The court, in *Doe v. Jackman*, 5 Ind. 283, while conceding, as we have done, that the rule in *Shelley's Case* is the law of Indiana, said: "But the term 'heirs' is one of limitation. It has a fixed and legal meaning, and a mere presumed intention will not control its signification. It can not be held a word of purchase, unless the testator's intent so to use it appears manifest." We have made these extracts from our cases, not for the purpose of establishing the general rule that the testator's intention must govern, but for the purpose of proving that it has long been the rule that there is a difference between deeds and wills in

respect to the operation of the rule in *Shelley's Case*, and that the rule does not apply with the same rigor to wills as to deeds. There are many other cases in our reports where the rule in *Shelley's Case* was insisted upon, but in which the court denied its application, and held that the intention of the testator should govern. *Doe v. Harter*, 7 Blackf. 488; *Baker v. Riley*, 16 Ind. 479; *Pattison v. Doe*, 7 Ind. 282; *Jones v. Miller*, 13 Ind. 337; *Hull v. Beals*, 23 Ind. 25; *Rusing v. Rusing*, 25 Ind. 63; *Prior v. Quackenbush*, 29 Ind. 475; *McMahan v. Newcomer*, 82 Ind. 565: Decisions ruling in cases of deeds do not, therefore, necessarily govern in cases of wills.

The testator who executed the will which is now before us, in terms, restricts the devisee's estate to one for life. The will contains a clause declaring that Lanphear shall hold "during his natural life," and although such a clause will not control in a case where the technical words are used which carry the case within the rule in *Shelley's Case*, still it is not meaningless, for it does possess force, and does afford assistance in the work of construction. *Daniel v. Whartenby*, 17 Wall. 639; *Montgomery v. Montgomery*, 3 Jones & L. 47.

If it were not for the technical rule, the clause would itself be sufficient to evidence to the courts the testator's intention, but where the will contains the words which invoke the operation of the rule in *Shelley's Case*, such a clause can not, it has long been settled, break their force. But, in this instance, there is to be added to the force of the clause the material fact that the testator uses the word "children" immediately after Lanphear's name. This is an important fact, for the word "children" is a word of purchase and not of limitation, and when used without words adding to its force the first taker of the estate does not take the fee. If we had nothing more than the clause quoted and the words "his children," it would be perfectly clear that only a life-estate was vested in Lanphear, but we have this provision: "And if he have no children, or if there be no heirs of his body,

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then the real estate shall go to the other heirs of his own blood," and the word "heirs" or the words "heirs of his body," if not otherwise defined by the testator, would carry a fee to the first taker. The presence of these words has the effect to somewhat obscure and darken the meaning of the will, but not to control its construction. We have seen that it is the right of a testator to affix his own definition to the words he uses, and we think it plain that the testator has defined the words "heirs of his body" to mean children. The words are so used as to clearly indicate that the testator meant them to signify the same thing as the word "children;" they are simply the repetition of the same meaning in a different form of words. If we assign to the words "heirs of my body" this meaning, we give full effect to the clause "during his natural life," to the clause "his children," and to the manifest intention of the testator as it appears from the general tenor of the whole will. In the case of *Rapp v. Matthias*, 35 Ind. 332, it was held that the word "heir" should be construed to mean children, where the context showed that to be the meaning the testator intended it to have. The provision in the deed in *Prior v. Quackenbush*, 29 Ind. 475, was, the grantor "doth give, grant, convey and confirm to the said Catherine and her heirs forever," and it was held that the word "heirs" was intended to mean children, because a subsequent part of the deed showed that this was the sense in which the grantor used the word. In the case of *Cleveland v. Spilman*, 25 Ind. 95, the will read, "I do also will and bequeath to my wife, Eliza Spilman, and my heir, if she should have one, equal, if not, all to her," and it was held that this provision vested in the wife and the unborn child all of the testator's real estate, because the context showed this to be the intention of the testator. An English writer says: "Upon the same principle, in the converse case, *i. e.*, where the words *heirs of the body* are explained to mean some other class of persons, the rule does not apply."

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3 Jarman Wills (5 Am. ed.) 117; *Webster v. Cooper*, 14 How. 488; *Powell v. Glenn*, 21 Ala. 458, see p. 466.

The provision of the will that if Lanphear should die leaving a widow, she should take the land for life, tends strongly to show the testator's intention to limit him to an estate for life; for, to have given him an absolute fee would have cut off all other estates. It is not material to inquire whether the devise to the possible widow of Lanphear is or is not valid, for, if he took nothing more than a life-estate, then the decision below was correct, whether the devise to the possible widow was or not void. If it were conceded to be void, that would not destroy its effect as evidence of the testator's intention.

Judgment affirmed.

Filed Nov. 25, 1884. Petition for a rehearing overruled Jan. 27, 1885.

No. 11,799.

KERSEY ET AL. v. TURNER, AUDITOR.

DRAINAGE.—Attorney's Fees.—County Auditor.—The act concerning drainage by proceedings before county boards (R. S. 1881, sections 4285, 4317,) makes no provision for the payment of attorney's fees out of the county treasury, and any allowance therefor by viewers is void, and there is no duty on the part of the auditor to issue a warrant therefor.

From the Grant Circuit Court.

J. A. Kersey and L. D. Baldwin, for appellants.

FRANKLIN, C.—Appellants commenced proceedings for a mandate against the auditor of Grant county, to compel him to issue a warrant upon the treasurer of said county for their fees as attorneys in a certain drainage proceeding in said county. An alternative writ was issued, to which defendant made return.

Appellants demurred to the return, which was overruled by
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the court. Appellants excepted, and judgment was rendered for appellee. The only error complained of is the overruling of the demurrer to the return.

The question presented is, can attorney fees be assessed, taxed up and collected, as a part of the expenses of the location or construction of the ditch, from the land-owners affected thereby, or from the county treasury?

The motion alleges that the fees claimed accrued in a certain ditch proceeding affecting lands in three counties, and that the viewers awarded to said appellants as fees for their services as attorneys in said cause as follows: In Wells county \$131.64, in Blackford county \$79.52, and in Grant county \$554.65. That the sum of \$224 of said sum in Grant county had been voluntarily paid into the treasury of said Grant county, and prayed for a writ of mandamus to compel the auditor to issue his warrant to said treasurer to pay to appellants said sum.

The auditor stated in his return to the alternative writ that the board of commissioners of said Grant county, in approving the final report of the viewers, excepted therein "attorneys' fees," for the reason that there was no authority therefor. This order of the board was made at the March term, 1884.

The 4294th section, R. S. 1881, provides: "And when damages are awarded to any person or persons, or corporations, as provided by this act, the board of commissioners shall order the same to be paid out of the county treasury to the person, persons, or corporation entitled thereto."

The 4300th section provides: "Whenever the board of commissioners establish a public ditch, drain," etc., "it shall order the viewers * * to * * make a final report, in which they shall specify the time in which each share or allotment of the ditch shall be constructed and completed; and they shall apportion the costs of the location thereof, including printer's fees, the damages, if any shall have been allowed, and compensation

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to the laborers who assisted the viewers in marking out the ditch, and award to each person or persons or corporation owning the lands assessed for the construction of said work their proportionate share of said costs, and shall specify the time in which such costs and expenses shall be paid to the county treasurer, and file their report with the auditor, after having subscribed and sworn to the same. And it shall be the duty of the viewers and reviewers to file with their reports an account of the names of the laborers and the time each was employed by them. And all compensation and damages allowed by this section shall be collected by the treasurer as the other taxes are collected; and the compensation paid out, when collected on an order from the auditor, to the parties entitled thereto; and the damages, when collected, shall be placed in the county fund, to compensate the county for the damages previously paid, as required by section ten of this act. (Section 4294.)”

The 4314th section makes further provisions for compensation as follows:

“The surveyor and engineer shall be allowed the sum of four dollars per day for every day he is necessarily engaged in performing the duties required of him by this act; which sum shall be paid to him, quarter-annually, out of the county treasury, upon his filing before the board of commissioners an itemized account of his services, verified by his oath; and the cost of publishing the notices of jobs to be let by the auditor, and of all blanks and stationery required by him in the performance of his duties, shall be paid by the county. The viewers and reviewers shall each be allowed two dollars per day for each and every day they are necessarily engaged in viewing and reviewing ditches, and making up and filing their reports; which sum shall be paid to them out of the county treasury. Each chainman, axeman, rodman, and all other hands necessary to the prompt execution of the work of locating a public ditch, shall be allowed one dollar and fifty

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cents per day for the time actually employed, to be paid as hereinbefore provided."

The foregoing includes all the provisions of the statute in relation to compensation for services outside of actual construction of the work.

These ample provisions, having been made for the payment for specified services, necessarily, by implication, excludes all other services, not specified, from the provisions made for those that are specified. No order of the board of commissioners was ever made for the payment of said fees. Hence there was no authority for the auditor to issue such warrant. But it is insisted by appellants that the county board, in approving the report of the viewers, had no right to except the attorney fees from payment; that said report was required to be filed with the county auditor, and the board of commissioners had nothing to do with it by way of approval or otherwise, and that such exception was a nullity. If that be true, and the viewers included in their report a matter not authorized by the statute, the including of such matter would also be a nullity and void, and the auditor would not be authorized to issue his warrant by virtue of such void matter being in the report of the viewers.

We can find no statute requiring either the land-owners affected by the ditch, or the county, to pay the attorneys for their services in getting up and prosecuting the ditch proceedings; like in all other cases, they must look for pay for their services to those who employed them, unless there is some special provision of the statute for payment otherwise, and we know of no such provision.

The amendment of the statute in 1883, referred to by appellants, does not apply to this proceeding; that is an amendment of the statute in relation to drainage proceedings in the circuit court by drainage commissioners. This is a proceeding by viewers before the board of commissioners, and an entirely different proceeding; and we decide nothing as to the amended statute.

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There was no error in overruling the demurrer to the return to the alternative writ. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed Dec. 13, 1884. Petition for a rehearing overruled Feb. 20, 1885.

No. 11,955.

STATE, EX REL. HEINEY, *v.* WASSON.

ELECTIONS.—Ballots.—The statute, R. S. 1881, section 4701, requiring election tickets to be printed on plain white paper, prescribes no grade, quality or thickness of paper, and does not require absolute uniformity.

SAME.—Evidence.—Where the question involved is whether certain tickets printed on paper, plain and white, but unusually heavy, were lawful, evidence by a printer that for ten years he had been in the habit of printing tickets on ordinary paper, and that paper such as was used for the tickets in question had not been so used, is immaterial, and proof that the person whose right to office was in question, because of the use of such thick paper, had no agency in having such paper used, is merely harmless.

SUPREME COURT.—Weight of Evidence.—Whether a cause be at law or in equity, the Supreme Court will not reverse on the weight of the evidence.

From the Marion Circuit Court.

D. Turpie, J. W. Nichol and J. E. Franklin, for appellant.

T. A. Hendricks, A. W. Hendricks, C. Baker, O. B. Hord, A. Baker, E. Daniels, R. B. Duncan, J. S. Duncan, C. W. Smith and J. R. Wilson, for appellees.

HAMMOND, J.—This was a proceeding, in the nature of a *quo warranto*, against the appellee, to show by what right or authority he exercised the duties of the office of treasurer of Marion county.

A trial by the court resulted in a finding for the appellee, upon which judgment was rendered over the relator's motion for a new trial and exceptions. The overruling of that mo-

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tion is the only error assigned. The causes for which the new trial was asked were, that the finding was contrary to the law and the evidence, not sustained by sufficient evidence, that certain evidence offered by the relator was improperly excluded, and that certain other evidence offered by the appellee was improperly admitted.

The questions in issue, as presented by the information and the answer, are stated in the appellant's brief as follows:

"The information herein, which is the complaint in such cases, is in two paragraphs. The information charges, substantially, that the relator received at the November election, 1882, 12,642 votes for the office of treasurer of Marion county, Indiana; that the said defendant Wasson had counted as cast for him 13,028 votes, and had been declared elected by a majority of 386 votes, and had been duly commissioned and qualified as such treasurer; and was acting as such in said office; but that the tickets cast for the defendant at said election were not printed 'on plain white paper, without any distinguishing mark or other embellishment,' as the law directs; 'but that the said tickets upon which said Wasson's name was printed were of smooth finish, upon white, double-ply cardboard, stiff and elastic, thicker than ordinary plain white paper,' and was 'such as to easily distinguish it from plain white paper.'

"The second paragraph of the information avers that the tickets upon which the defendant Wasson's name was printed at said election 'were not printed upon plain white paper' without any 'distinguishing mark or other embellishment,' as required by law, but were printed 'upon lithographic plate, stiff and elastic, smoother and thicker than plain white paper, and could be, and were, readily distinguished from tickets printed upon plain white paper, both by *touch* and *sight*;' 'that the election officers, viz., inspectors, judges and clerks could readily ascertain and know, both by *touch* and *sight*, and any other persons could readily know whether a voter was voting a Republican ticket or some other' at said elec-

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tion; that the Democratic and National tickets at said election were printed upon 'plain white paper;' that 5,000 of such lithographic plate tickets were cast and counted for the defendant at said election, in contravention, and in fraud of the statute upon the subject of elections; that such votes and ballots were fraudulent and void.

"The answer by Wasson is a special general denial, in which he admits that he has possession of the office, as charged, but denies that any of the ballots cast for him were fraudulent, or that he had any knowledge of their character before use."

The simple question presented by the record is, were the ballots cast for the appellee at the election under which he claims his office illegal?

Section 4701, R. S. 1881, being section 23 of "An act concerning elections," approved April 21st, 1881, Acts 1881, p. 482, is as follows:

"All ballots which may be cast at any election hereafter held in this State shall be written or printed on plain white paper, of a uniform width of three inches, without any distinguishing mark or other embellishment thereon except the names of the candidates and the offices for which they are voted for."

The case made by the information, so far as the pertinency of the evidence thereto is concerned, is that the tickets upon which appellee's name appeared were not printed upon plain white paper without any distinguishing mark, etc., thereon except the names of the candidates and the offices they were voted for; but, on the contrary, said tickets "were printed upon lithographic plate paper, which was stiff and elastic, smoother and thicker than plain white paper, and could be, and were, readily distinguished from tickets printed upon plain white paper, both by touch and sight."

It does not appear to have been the intention of the Legislature, in section 4701, *supra*, to require absolute uniformity in the ballot with regard to the grade or quality of the material upon which it is to be printed. It seems to be sufficient

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if the paper is plain white, of the width of three inches, and without distinguishing marks or other embellishments thereon, except the names of candidates, etc.

There was evidence in the case tending to show that there are various grades of paper known as plain white paper, some of which were heavy and others light. A witness testified that the words "plain white paper" would include all grades of white paper from common newspaper to the best class of book paper, and that the term "plain white paper" did not indicate any particular grade or quality of paper. There was much evidence to the same effect.

The tickets on which the relator's name appeared were printed upon what a witness described as "No. 2 book paper." Those containing the appellee's name were printed upon paper described by the same witness as "Western plate," or "lithographer's paper," which was heavier and thicker than the paper described as "No. 2 book paper."

While it would be competent for the Legislature to prescribe the quality and grade of paper to be used for ballots, it has not done so. In the absence of a statutory standard, the difficulty of judicially determining the grade and quality of paper that should be used for ballots is well shown in the following extract which we take from the brief of counsel for the appellee:

"There are ninety-two counties in the State of Indiana. We suppose that in a large majority of the counties the tickets would be printed by the local offices in the various counties; the paper which would thus be used for ballots throughout the State would vary according to the quality and grade of white paper in stock in the various offices. If even the cheap papers were found in stock in every office, unless they were the product of the same mill, there would not be a uniformity of appearance; it is at once seen that unless some given grade or quality of plain white paper is fixed by the statute as a standard, or some method of conference provided, or authority vested in some officer of the State to furnish the

State, *ex rel.* Heiney, v. Wasson.

paper, or direct the quality or grade of paper to be used, the tickets in the various counties would, almost of very necessity, differ essentially in substance and appearance. We can not suppose that such a fact as this escaped the attention of the General Assembly; and if that body had desired uniformity in the tickets, they certainly would, by some method, have attempted to fix a standard or provide for such uniformity by some other means that readily suggest themselves to every mind upon very short consideration. Such a construction of the statute as is not contended for by appellant would almost inevitably lead to a rejection of a large majority of all the ballots cast at any general election in the State of Indiana, if the ballots cast at any particular precinct be adopted as a standard.

"Now, neither party can adopt any particular grade of paper for their ballots, and then claim that the other party must make the same selection. We have as much right to say to the appellant that your ballots were printed on too thin paper, and for that reason were distinguishable, as they have to say that our tickets were too thick, and therefore distinguishable."

The object of the statute undoubtedly was to secure the privacy of the ballot. But if a voter uses a ballot which comes within the letter of the statute, his vote is not to be rejected because the quality or grade of the paper upon which it is printed differs from that of others, which also come within the letter of the statute, even though the difference be so perceptible as to partially destroy the privacy of the ballot.

Section 23 of the act of March 11th, 1867, 1 R. S. 1876, p. 439, was substantially the same as section 4701, *supra*, being as follows:

"SEC. 23. That all ballots which may be cast at any election hereafter held in this State shall be written or printed on plain white paper, without any distinguishing marks or other embellishments thereon except the name of the candidates and the office for which they are voted for, and in-

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spectors of elections shall refuse all ballots offered of any other description: *Provided*, Nothing herein shall disqualify the voter from writing his own name on the back thereof."

In *State, ex rel., v. Adams*, 65 Ind. 393, the ticket claimed to be illegal under the above statute was alleged in the information to have been "printed on very white, thin, and hard paper, which rendered it quite transparent; that, at the head of said ticket, the words 'Republican Ticket' were printed in with very peculiar and unusual type, and in unusual form, and with very black ink, and, by reason thereof, the words 'Republican Ticket' were readily seen and easily read and understood by an inspection of the other side of the ticket; that, in the ordinary way of folding the said ticket, the words 'Republican Ticket,' so printed as aforesaid, were exposed in such manner that the officers of the election, or any other person who might be present and desire to know the ticket which any elector was about to vote, could readily ascertain and know whether a person was voting the Republican, Democratic or National ticket."

This court in that case held the information insufficient, thereby deciding that a ballot was not to be rejected because the paper on which it was printed was so thin as to be quite transparent. If a ticket on paper so thin as to be quite transparent is not illegal, the reason would be equally strong for holding a ticket valid although the paper upon which it was printed should be regarded as unusually thick and heavy.

There is no claim in the case before us that there were any distinguishing marks or other embellishments on the tickets containing the appellee's name that rendered them invalid except the grade or quality of paper on which they were printed. It is not insisted that the paper was not *white*, but it is urged that it was not *plain white paper*. What was plain white paper was a question of fact to be decided upon the evidence. We have examined the evidence carefully, and it tends quite strongly to support the finding of the trial court. Under the rule in such case this court can not weigh the evidence to as-

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certain whether the court below decided according to its preponderance. Counsel for the relator insist, however, that the rule does not apply to this case ; that this is a proceeding in chancery, and that in such case it is the duty of the court to examine the evidence and to reverse the judgment if the finding of the trial court is not sustained by the weight of the evidence. It is not necessary in this case to decide whether or not a proceeding by information to test the right to hold an office is purely a chancery cause, requiring a trial by the court without a jury. But see, upon this question, *State, ex rel., v. Reynolds*, 61 Ind. 392. But in chancery cases not triable by jury, the ancient practice of having the evidence taken before a master commissioner, and brought before the court upon paper no longer prevails. The court trying the cause now hears the testimony from the mouths of living witnesses, and has every opportunity to test the weight of the evidence that judges trying causes as a jury in the old law court had, and his findings on questions of fact should no more be disturbed on appeal than the findings of fact made by a judge upon the trial of a case at law, and so this court has expressly decided. *Pence v. Garrison*, 93 Ind. 345 ; *Miller v. Evansville Nat'l Bank*, *post*, p. 272.

At the trial the relator offered to prove by one of his witnesses, who had testified to the quality of the paper upon which the tickets voted for relator and appellee were printed, that for ten years prior to 1882, he had been in the habit of printing election tickets upon ordinary paper similar to that used in printing the tickets containing the relator's name, and that prior to 1882 paper for printing tickets had not been used similar to that upon which appellee's name was printed. There was no error in rejecting this evidence. The legality of the tickets upon which appellee's name was printed was not to be determined by comparing the paper used for such tickets with that in use in previous years for ballots at elections.

As we have already observed, the law does not prescribe what grade or quality of plain white paper shall be used for

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tickets. If the paper may, in language ordinarily used and understood, be properly designated as plain white paper, it answers the purposes of the law without regard to its grade or quality. It is obvious, therefore, that proof that plain white paper of a different grade or quality from that used for tickets upon which appellee's name was printed, had previously been in use for the printing of tickets, could have had no material bearing in the present case.

Appellee was permitted to testify at the trial, over the relator's objections, that he had not, directly or indirectly, had any knowledge or information in regard to the character of the tickets upon which his name was printed prior to the day of the election, and that he was not consulted, directly or indirectly, in reference to the preparation of such tickets.

If there was any evidence tending to show that the tickets upon which appellee's name was printed were prepared and used for the fraudulent purposes charged in the information, we think it was competent for the appellee to prove that he was not a party to, nor cognizant of, such fraud. Such evidence of good faith upon his part might have but little weight, yet we think it was competent to go to the court to be considered with other evidence upon the question of fraud. If there was no evidence tending to establish fraud, then the admission of the evidence complained of was, at most, an error that was harmless.

We have not deemed it necessary to the decision of this case to consider whether section 4701, *supra*, was mandatory, or merely directory, as to the ticket prescribed for use in elections. Whether said statute is to be regarded as mandatory or merely directory, we think that the evidence abundantly sustains the finding and judgment of the trial court.

There was no error in overruling relator's motion for a new trial. Judgment affirmed, at relator's costs.

ELLIOTT, J., did not participate in the decision of this case.

Filed Jan. 3, 1885.

Trittip v. Morgan.

No. 11,571.

TRITTIPO v. MORGAN.

QUIETING TITLE.—*Trial by Jury.*—In a suit to quiet title under the statute, trial by jury must be had if demanded, the action being a creature of the statute and not existing prior to June 18th, 1852.

SAME.—*Will.*—Where a will is a link in a chain of title in question, it is admissible in evidence in support of such title.

SPECIAL VERDICT.—If a special verdict do not find facts sufficient to establish the issue in favor of the party having the burden, judgment goes against him.

From the Hamilton Circuit Court.

A. F. Shirts, G. Shirts and W. R. Fertig, for appellant.

D. Moss, R. R. Stephenson and H. A. Lee, for appellee.

ELLIOTT, J.—The appellant and the appellee both claim title to the same parcel of land and both claim through the same grantor, John Humble, and both assert title and seek to have it quieted, the former by his complaint and the latter by his counter-claim.

The appellant demanded that the cause should be tried by the court; this request was denied and the cause submitted to a jury for trial. This ruling is here vigorously assailed. The contention of the appellant is, that the issue joined in an action to quiet title prior to June 18th, 1852, was one of exclusive equitable jurisdiction, and under the act of 1881 such an issue must be tried by the court.

It is no doubt true that our statutory action to quiet title combines and enlarges the equity proceedings known as bills of peace and bills *quia timet*. *Ragsdale v. Mitchell*, 97 Ind. 458; *Farrar v. Clark*, 97 Ind. 447; *Green v. Glynn*, 71 Ind. 336; *Farrar v. Clark*, 85 Ind. 449.

The principles upon which our statutory action is founded are derived from the doctrines of the courts of equity, but these principles are moulded into a new form by the statute. New features are added to the old remedies, a different method of procedure is provided, and an essentially new character is

99	286
131	172
131	297
132	484
133	426
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141	543
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142	498
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impressed upon the proceeding. As the proceeding now exists it is essentially the creature of statute, although the principles upon which it is founded are borrowed from the doctrines of the courts of chancery. The statute itself recognizes the proceeding as a new remedy created by the Legislature, for it specifically prescribes rules for the government of actions for the recovery of possession of lands, and, after providing that "An action may be brought by any person either in or out of possession," "for the purpose of determining and quieting the question of title," declares that the rules prescribed for the government of actions to recover possession shall apply to actions to quiet title. R. S. 1881, secs. 1070, 1071. We think it clear that the issue joined in the statutory action to quiet title can not be said to be one that was exclusively of equitable jurisdiction under the law as it existed prior to June, 1852. The truth is that prior to the enactment of our statute, there was no such issue either at law or in equity as that which the litigants arrive at in the present action to quiet title to real property. The issue is such as the statute creates, and not such as existed under the doctrines of the courts of equity.

Our statutory action for the recovery of real property is intended to substitute for the old action of ejectment, with its cumbersome machinery and useless fictions, a simple and more sensible proceeding, that will give a direct road to the merits of the controversy. It clearly contemplates a trial by jury, and the provision to which we have referred makes the same rule applicable to actions to quiet title. The provisions upon the subject of quieting title and recovering possession are too closely interwoven to be separated.

The will of John Humble was one of the links in the chain of the appellee's title, and for this reason was properly admitted in evidence. A deed, will, or other instrument, which forms one of the links in a party's title, is, it is quite clear, competent evidence in support of the title asserted by him.

The material facts embodied in the special verdict are these: In 1855 John Humble owned the land described in

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the complaint and counter-claim, and in that year sold nineteen acres adjoining it to Andrew J. Trittipo, but, by the mistake of the scrivener who prepared the deed, the land now in controversy was embraced in it. This land was not sold by Humble, nor did he intend to sell it; Andrew J. Trittipo never derived title to it, and never claimed to be the owner, although he resided in the immediate neighborhood. Prior to his death Andrew J. Trittipo conveyed all of his land to the appellant Samuel Trittipo. The lands, here the subject of controversy, were not specifically described, but were embraced in a general clause of the deed, reading thus: "All the lands owned by the said Andrew J. Trittipo in sections two and three." John Humble retained possession of the land described in the pleadings and exercised dominion over it until the time of his death, and in his last will devised it to his wife for life, with remainder in fee to his children. By purchase from the devisees the appellee acquired title.

The burden of the issue was on the appellant, and unless the facts stated in the special verdict show title in him he can not complain that judgment was entered against him. The settled rule is that a judgment can not go upon a special verdict in favor of the party who has the burden, unless the facts stated are such as entitle him to judgment. If there are not facts sufficient to authorize a judgment in his favor, he will fail. *Pittsburgh, etc., R. R. Co. v. Spencer*, 98 Ind. 186; *Vinton v. Baldwin*, 95 Ind. 433; *Dodge v. Pope*, 93 Ind. 480; *Dixon v. Duke*, 85 Ind. 434; *Ex Parte Walls*, 73 Ind. 95; *Stropes v. Board, etc.*, 72 Ind. 42.

In an action to quiet title the plaintiff, as the statute expressly provides, must recover on the strength of his own title. R. S. 1881, secs. 1057, 1071. It was indispensably necessary for the appellant to possess title, and, according to the special verdict, he never possessed or acquired title. His grantor, Andrew J. Trittipo, did not take title, for the reason that the description of the land was embodied in the deed by mistake, and the general clause in the deed upon which the appellant

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relies as vesting title to the land in dispute only professes to convey such lands in sections two and three as the grantor owned. As the grantor did not own the land in dispute his deed did not convey it. It can not be inferred that Andrew J. Trittippo intended to convey land that he did not own.

In order to acquire title to land described in such general and indefinite terms as those employed in the clause of the deed which we have quoted, it is necessary for the claimant to prove that his grantor was actually the owner of the land. As such a description operates only upon lands actually owned by the grantor, the only way in which it can be made effective is by evidence that it was owned by him at the time the conveyance was executed. The special verdict before us, instead of finding this fact affirmatively, decisively negatives its existence. As between the parties to the deed, and in cases where the land owned by the grantor is intended to be conveyed, such a description is sufficient, for the reason that it supplies means of making the description certain. *Leslie v. Merrick*, *ante*, p. 180. But, even in such a case, it is necessary to establish the fact that the land claimed was owned by the grantor, and that the deed was intended to operate upon it. We decline to disturb the verdict upon the evidence.

Judgment affirmed.

Filed Jan. 3, 1884.

No. 11,795.

MILLER ET AL. v. THE EVANSVILLE NATIONAL BANK.

FRAUDULENT CONVEYANCE.—*Complaint to Set Aside Deed by Judgment Creditor.*—*Quietting Title.*—*Trial.*—*Causes in Equity.*—*Jury.*—A complaint by a judgment creditor to set aside conveyances of real estate as fraudulent, and subject some of the lands to execution upon the judgment, and quiet the plaintiff's title to some of them already purchased on execution, presents a cause in equity triable by the court under the statute, R. S. 1881, section 409.

SAME.—*New Trial as of Right.*—*Case Distinguished.*—Where the complaint

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seeks to annul a deed as fraudulent, and to quiet the plaintiff's title as against it, and the defendant by counter-claim claims title to the same lands by virtue of that deed, and seeks to quiet his title, the defendant, if the finding be against him generally, is entitled to a new trial as of right under the statute, R. S. 1881, section 1064. *Butler University v. Conard*, 94 Ind. 353, distinguished.

SUPREME COURT.—*Weight of Evidence*.—The Supreme Court will not, in any case, whether at law or in equity, reverse upon the weight of evidence.

From the Superior Court of Vanderburgh County.

C. Denby and D. B. Kumler, for appellants.

A. Iglehart, J. E. Iglehart, E. Taylor and V. Bisch, for appellee.

FRANKLIN, C.—Appellee commenced this action to set aside as fraudulent several conveyances of real estate in Vanderburgh and Posey counties, including some city property in Evansville, and to subject parts of the same to the payment of certain judgments in favor of appellee, and prayed for a quieting of the title in it to portions of said real estate that had been purchased by appellee under said judgments at a sheriff's sale thereunder, and for the sale of the remainder of said real estate to pay the balance of said judgments.

Demurrers were overruled to the complaint, and the defendants filed answers of general denial and their several cross complaints, asking to have their respective titles quieted to the portions thereof claimed by each of them.

Upon the trial the court found in favor of the plaintiff as to parts of the real estate, and in favor of some of the defendants as to other parts, and over motions for a new trial judgment was rendered upon the finding.

A motion to submit the trial of a certain fact in issue to a jury was overruled, and a motion for a new trial as of right under the statute was also overruled.

The errors assigned are the overruling of the demurrer to the complaint, the overruling of the motion to submit to a jury the trial and determination of the question of fact as to

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whether Catharine Miller had paid a full consideration for the land conveyed to her, the overruling of the motion for a new trial, and the overruling of the motion for a new trial as of right under the statute.

The objection urged against the complaint is that it contains a misjoinder of causes of action, in this, that it seeks to set aside the deeds as fraudulent, and to quiet the title in the plaintiff.

So far as the ruling upon the demurrers to the complaint is concerned, it is wholly unnecessary to investigate and decide whether the complaint contains sufficient averments to make a good cause of action to quiet title or not. If it does, the 341st section of the R. S. 1881 expressly provides that "No judgment shall ever be reversed for any error committed in sustaining or overruling a demurrer for misjoinder of causes of action." Hence there could be no available error in overruling a demurrer to the complaint for that cause.

The specification of error that the court overruled appellants' motion to submit a certain question of fact to the trial and determination of a jury, is not well taken. This is a chancery suit, and under the recent statute was required to be tried by the court. While the court had the right to submit a question of fact to a jury to decide for the information of the court, still their verdict in such cases is not binding upon the court, and it is entirely within the discretion of the court as to whether it will seek such information by a jury. But this specification does not appear to be insisted upon by appellants in their brief, and may be considered as waived.

Appellants have insisted at considerable length, and with great ingenuity and ability, that the finding of the court is not sustained by sufficient evidence, and that a new trial should have been granted.

The evidence is very voluminous, and in some instances contradictory. We have examined it far enough to definitely ascertain that a portion of the evidence, with the surrounding circumstances, strongly tends to support the finding of the

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court. But the appellants claim that the ordinary rule, where the evidence clearly tends to support the finding, this court will not weigh it and reverse the judgment upon a mere preponderance, ought not to apply to this class of cases; that this is an action in the nature of a chancery suit, and that this court should weigh the evidence and decide upon its merits; that this court is as capable of weighing the evidence as was the court below, and that the old chancery practice should be applied.

Under the old practice, in the appellate courts, actions at law were determined upon writs of error, and chancery suits by trial *de novo* upon the evidence, it all being in the shape of depositions, and final judgments were rendered therein without remanding the case to the lower court for a new trial. Upon the adoption of the code practice, writs of error and the distinctions in the forms between common law and chancery practice were abolished, and since that time all cases alike come to this court on appeal, in which the evidence, whether oral or in depositions, might be brought by bill of exceptions.

Under this code practice of appeals, when a judgment is reversed by this court, no final judgment upon the merits is rendered, but the cause is remanded to the lower court for further proceedings, and the rule first adopted upon the subject of weighing the evidence was, that if the verdict or finding upon the whole evidence was clearly wrong, the judgment was reversed for that reason. But practice demonstrated that this rule was of uncertain enforcement, and it is a well known fact that the judge who saw the witnesses, heard them testify, and observed their demeanor on the witness stand, was much better enabled to weigh the evidence and come to a correct conclusion than this court could possibly be by only seeing the record of the evidence, which is seldom full and frequently imperfect.

From these considerations, the rule is now well established that where the evidence fairly tends to support the verdict or finding, it will not be disturbed by this court, and this rule

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applies to causes in the nature of chancery suits, the same as actions at law.

The fact that the statute requires a chancery suit to be tried by the court instead of a jury, does not change the rule in relation to the evidence. Parol evidence is admissible in an action in the nature of a chancery proceeding as well as in an action in the nature of a common law proceeding. The same rules govern the court below in weighing the evidence applicable to both kinds of actions, and we see no reason why the rule should be different in this court. See the case of *Pence v. Garrison*, 93 Ind. 345.

The case under consideration is an appropriate illustration. Here a large part of the evidence was by parol, consisting, to a considerable extent, of the testimony of relatives and interested parties; they were before the judge trying the case, who had an opportunity of observing their entire demeanor while on the witness stand, and to become conversant with some facts and circumstances surrounding the case that it would be impossible to accurately set forth in a bill of exceptions embracing the evidence. We think the recent rule of this court, as above stated, is as applicable to this case as it possibly could be to any action in the nature of a common law proceeding. There was no available error in overruling the motion for a new trial.

As to the specification that the court erred in overruling the motion for a new trial as of right, it matters not whether the complaint did or did not contain sufficient averments to constitute a good cause of action to quiet title in the plaintiff, appellants' cross complaint did contain sufficient averments to put that question in issue in the case, and the finding and judgment of the court against appellants and for appellee, notwithstanding there was no judgment rendered quieting title in appellee, was, upon that issue, a sufficient judgment rendered against appellants to authorize a new trial as of right under the statute. See the cases of *Adams v. Wilson*, 60 Ind. 560, *Physio-Medical College v. Wilkinson*, 89 Ind. 23, *But-*

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ler University v. Conard, 94 Ind. 353, and *Cooter v. Baston*, 89 Ind. 185.

In the case under consideration appellee claimed title to certain lands by virtue of a sheriff's sale, and asked to have a deed to appellants for a portion of said lands set aside for fraud, and that its title thereto be quieted. Appellants, in their cross complaint, claim title to the same lands by virtue of a prior deed to appellees from the execution defendant, and asked to have their titles quieted thereto. The title to this land was certainly put in issue by the pleadings, and the judgment rendered would bar any further subsequent litigation over the conflicting claims of the parties thereto. The object of both parties was to get their respective titles quieted, and we think appellants were entitled, under the statute, to a new trial as of right, and that the court erred in overruling their motion for such new trial; for which error the judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below, in so far as it affects appellants, be and the same is in all things reversed, at appellees' costs, and that the cause be remanded, with instructions to the court below to sustain appellants' motion for a new trial as of right, and for further proceedings.

Filed Oct. 16, 1884.

ON PETITION FOR A REHEARING.

HAMMOND, J.—Counsel for appellee insist that the above decision is in conflict with *Butler University v. Conard*, 94 Ind. 353. We do not think so. In that case the complaint was in two paragraphs; the first to foreclose a mortgage upon real estate, and the second to recover possession of the same real estate. The answer was by denial, and by setting up, and asking for the foreclosure of, a tax-lien claimed to be paramount to the plaintiff's mortgage. The defendant also filed a cross complaint, in which he claimed to own the land in controversy, and asked to have his title quieted. The find-

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ing and judgment were for the plaintiff as to its mortgage and for the defendant upon his tax-lien, giving the latter priority over the former. But there was no finding or judgment for the plaintiff as to its claim for possession, nor for the defendant upon his cross complaint. It was held that the plaintiff was not entitled, as of right, to a new trial. The court said: "We think * * that the true rule is, that where a cause of action to quiet title to, or to recover possession of, real estate is improperly joined with a cause of action in which a new trial as of right is not allowable, the law as to new trials relating to the latter cause of action should govern, and that a new trial in such case, as a matter of right, ought not to be granted. A different rule would place it in the power of parties in all cases to extend the statute, * * to actions in which it was not intended to apply."

The rule stated is correct as applied to a case of misjoinder of causes of action where the judgment, as in that case, is upon a cause in which a new trial as of right is not authorized under the statute, for a different rule, as was there said, would place it in the power of parties to extend the application of the statute providing for new trials, without cause, to cases in which it never was intended to apply. But if, in that case, there had been judgment for the plaintiff upon its claim for possession, or for the defendant upon his cross complaint, there can be no doubt that a new trial as of right might have been properly granted.

In the case now under consideration the plaintiff sought, in its complaint, to set aside certain alleged fraudulent conveyances, and to quiet its title to a part of the lands therein described which it had, in part satisfaction of a judgment, purchased at sheriff's sale, and also to subject other real estate, embraced in said conveyances, to the payment of the residue of its said judgment. As both causes of action grew out of the same transaction, namely, the alleged fraudulent conveyances, and as equitable relief was sought in each cause, it may be doubtful whether there was a misjoinder of causes of ac-

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tion. If there was no such misjoinder, the appellants were entitled to a new trial, as a matter of right, even under the appellee's construction of the rule announced in *Butler University v. Conard*, *supra*. But conceding, without deciding, that appellee's complaint improperly joined two causes of action, the effect of the judgment in favor of the appellee was to quiet its title to real estate as well as to subject lands to the payment of the residue of its judgment. We think the case falls within the provisions of section 1064, R. S. 1881, and that the appellants were entitled to a new trial as a matter of right.

The petition for a rehearing is overruled.

Filed Jan. 2, 1885.

No. 10,562.

HAMMANN v. MINK.

PARTITION.—*Quieting Title.*—*New Trial as of Right.*—In an action for partition, where the defendant files a cross complaint to quiet his title to the whole land, and judgment is rendered against him, he is entitled to a new trial as a matter of right under the statute.

SAME.—*Payment of Costs to Clerk in Silver.*—*Judicial Knowledge.*—In such case the payment of costs may be made in silver, and where they are thus paid to a person who is clerk of the court, the party seeking the new trial need not prove that such person was the clerk, as the court takes judicial notice of its own officers.

SAME.—The clerk of the court has authority to receive costs, and a payment to him is sufficient.

SAME.—*Title by Guardian's Sale.*—*Order of Court.*—In such case, where the defendant claims the interest of the plaintiff under a guardian's sale, and the fact is found that such sale was made under the order of the court, was reported to and confirmed by the court, such confirmation, though irregularities intervened, renders the sale valid.

SAME.—*Guardian's Deed.*—*Confirmation.*—A deed made by the guardian to the purchaser before the sale is confirmed is invalid, and does not convey the title, but where such deed is afterwards reported to and approved by the court at the confirmation of the sale, the same is then effectual to convey the title.

SAME.—*Form of Deed.*—The mere omission to insert in such deed the page

99	279
137	400
99	279
129	280
99	279
131	296
99	279
134	74
234	460
99	279
148	576
99	279
161	568

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of the order book where the order of such sale is entered, does not invalidate such deed.

SAME.—Judicial Sale.—Liens.—Former Adjudication.—Special Findings.—Conclusions of Law.—Where the facts also found show that the defendant purchased the property for value, and without notice, under a judicial decree upon a lien thereon adjudged to be superior to the plaintiff's lien, such facts entitle him to judgment. The mere fact that some of the special findings are also blended with the conclusions of law stated, does not impair such findings of fact.

SAME.—Name.—Variance Between Report of Sale and Deed and Record.—Evidence.—Where the name of the purchaser in the report of sale and in the deed differs from the name in the final record, the report of sale may be read in evidence for the purpose of showing to whom the sale was made.

SAME.—Identification of Report.—Such report may be read without proof of its identification by an entry in the order book, as such report, found among the papers in the cause, is *prima facie* admissible.

From the Wayne Circuit Court.

W. D. Foulke and *J. L. Rupe*, for appellant.

W. A. Bickle, for appellee.

BEST, C.—The appellant, an infant, by her next friend, brought this action for the partition of certain real estate, improved and used as a brewery, situated in Wayne county, in this State, alleging in her complaint that she owned an undivided one-sixth and the appellee the residuc, as tenants in common.

The appellee filed an answer of two paragraphs. The first was the general denial, and the second alleged, at great length, that Christian Hammann died intestate, seized of the land in question, leaving his widow, Caroline Hammann, and the appellant as his only heirs at law, and that the latter has no claim to the land other than such as she acquired by inheritance from her father; that shortly after his death the widow was appointed the guardian of the daughter, and thereafter obtained an order from the proper court to sell the daughter's interest in said land; that in pursuance of such order she thereafter sold such interest in said land to Henry Winterling and Frederick Paulus for \$2,606.66, which was more than its appraised value; that thereafter said sale was reported to and

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confirmed by the proper court, and a deed made, approved and delivered to said purchasers; that thereafter the appellee acquired by purchase through said purchasers the title thus conveyed to them, and that he is the owner in fee of the same.

The appellee also filed a cross complaint, in which he averred, in addition to the facts alleged in the answer, that the guardian's deed, through which he claims title, omits to state the page of the order-book upon which the order of sale is entered; that the clerk, in making the final record, by mistake, inserted the name of "Henry Martischang," instead of "Henry Winterling," as purchaser, and that the appellee purchased said land in good faith and without any notice of any irregularities in such sale. Prayer that the proper deed may be executed, and that his title be quieted, etc.

An answer in denial of the cross complaint, and a reply in denial of the answer completed the issues. These were submitted to the court, and a finding was made for the appellant. A motion for a new trial as of right was granted the appellee, and a motion by the appellant to strike out such order was overruled. The issues were again submitted to the court, with a request that the court find the facts specifically, and state its conclusions of law. This was done. The appellant excepted to the conclusions of law, moved for a *venire de novo* and for a new trial, all of which were overruled, and final judgment was rendered for the appellee. These various rulings have been assigned as error.

The application for a new trial as a matter of right was in writing, verified before "James W. Moore, clerk," and in support of it William A. Bickle testified that he paid the costs, \$15.50, in silver, at the time the application was made.

The appellant insists that the court erred in granting such trial, because it was not shown that James W. Moore was the clerk of the Wayne Circuit Court. This was unnecessary. The court knows its own officers, and it is unnecessary to prove that of which it takes judicial notice. *Brooster v. State*, 15 Ind. 190; *Hipes v. State*, 73 Ind. 39.

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It is also insisted that the clerk had no authority to receive such costs, and in support of this position the case of *Scott v. State, ex rel.*, 46 Ind. 203, and several other cases previously decided, are cited.

These cases probably induced the enactment of the act of March 9th, 1875, the first section of which provides "That the clerks of the several courts throughout this State shall be, and they are hereby authorized to receive money in payment of all judgments, dues and demands of record in their respective offices, and all such funds as may be ordered to be paid into the respective courts of which they are clerks, by the judge thereof, and said clerks, with their sureties, shall be liable on their official bonds for all moneys so received," etc. 2 R. S. 1876, p. 17.

This statute is broad enough to embrace costs, and we think it clearly authorized the clerk to receive them. A payment to him, therefore, was a sufficient compliance with the law in this respect.

It is also insisted that the payment in silver was unauthorized, and hence the appellee was not entitled to a new trial. The record does not show that more than \$5.00 of this sum was due any person, and as such sum may be lawfully paid in the silver coins of the United States, we will not presume that more than such sum was due any one. If not more than \$5.00 was due any person, the payment of the whole was properly made in silver. In addition to this, if the clerk accepted the money, and was prepared to pay the parties entitled to the costs in legal money, the payment was sufficient. *Jessup v. Carey*, 61 Ind. 584; *Boyd v. Olvey*, 82 Ind. 294. The payment, therefore, does not appear to have been improperly made.

It is also insisted that the court possessed no power to grant a new trial as of right in a partition suit. This, by no means, follows. The power to grant such trial does not depend upon the name, but upon the nature, of the action. The cross complaint constituted an action to quiet title to real es-

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tate, and in such actions either party is entitled to a new trial as a matter of right. The fact that such action is introduced by cross complaint in no manner impairs such right, as has several times been decided by this court. *Adams v. Wilson*, 60 Ind. 560; *Miller v. Evansville Nat'l Bank*, ante, p. 272. The court did not, as we think, err in granting such new trial.

It is next insisted that the court erred in its conclusions of law upon the facts found. The facts are, in substance, these:

First. That Christian Hammann died intestate on the 18th day of September, 1867, seized of the undivided one-third of the premises in dispute, leaving his widow Caroline Hammann, and the appellant, his daughter, as his only heirs at law, and that the widow was thereafter, by the court of common pleas of Wayne county, where said real estate is situate, appointed the guardian of said daughter.

Second. That said guardian, on the 30th day of May, 1868, filed her application in said court for an order to sell the interest of her ward in said realty, and after the same was appraised at \$1,912.50, the same was ordered sold upon the usual terms, viz., one-third of the purchase-money in hand, one-third in twelve and the residue in eighteen months.

Third. That in pursuance of said order said guardian sold said realty, including the interest of said guardian therein, to Henry Winterling and Frederick Paulus, for about \$4,533.32, and on the first day of October, 1868, she made them a deed for her ward's interest, the consideration of which was named at \$2,266.66; that at the same time they paid her in cash \$1,000, and made her two notes, one of \$2,606.66, payable to her individually, and the other for \$293.33, payable to her as guardian, both of which were secured by mortgage upon the premises, and the evidence fails to show how the residue of the purchase-money was paid or secured; that said deed is in due form, except that it does not contain a reference to the page of the order book where the order is entered; that a re-

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port of said sale was made showing that said realty was sold to Henry Winterling and Frederick Paulus on the 30th day of December, 1867, for \$2,206.66, and upon the final record the name of "Henry Winterling" by mistake was entered as "Henry Martischang."

Fourth. That at the January term, 1869, of said court, said sale was confirmed and said deed approved.

Fifth. That on the 13th day of October, 1868, after said deed had been delivered, but before its approval, said Winterling and Paulus executed a mortgage upon said premises to one David Hoerner to secure a note of \$4,000, due from them to him; that at the April term, 1873, of the Wayne Circuit Court, said Hoerner brought an action to foreclose said mortgage against said Winterling and Paulus, and against said Caroline Hammann, who, by cross complaint, set up the mortgage so made to her by said Winterling and Paulus as a prior lien, and demanded its foreclosure; that issue was taken upon the cross complaint, the matter referred to a referee, a finding made against said Caroline and in favor of said Hoerner, and judgment rendered accordingly, ordering said property to be sold upon said decree; that an order of sale was issued thereon and said property duly sold by the sheriff of said county for \$3,000 to the appellee, who paid the purchase-money in good faith, and without any knowledge of any prior equity took the sheriff's deed, under which he has ever since held and now holds possession.

Sixth. That after said sheriff's sale, to wit, at the November term, 1873, of the Wayne Circuit Court, said Caroline, as such guardian, brought an action in said court against said Winterling and Paulus, and against the appellee, to foreclose said mortgage so given to her by said Winterling and Paulus, and upon an issue formed thereon the court found against said Caroline, and in favor of the defendants.

Seventh. "While it is found that the sale was made by the said guardian, under the order of the court of common pleas, to Winterling and Paulus, the evidence is not sufficient to en-

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able the court to find free from doubt as to whether the sale was made on the 30th of December, 1867, * * or on the 1st of October, 1868, but the convictions arising," etc., "make out a preponderance of evidence to this effect, that after the said Caroline had been appointed guardian, in 1867, she contracted with said Winterling and Paulus to sell her own and her ward's interest in the real estate and brewery, on the 30th day of December, 1867, for about \$4,500; that in October, 1868, and after she had obtained an order of sale, * * * she consummated the contract so made before, received \$1,000 of the purchase-money, took a mortgage to secure the balance named in the notes and mortgage, and what she so did the court subsequently ratified."

The court, upon these facts, concluded that the appellant's title was divested by the sale, and that the appellee was entitled to an order quieting his title.

The first question is, did the appellant's guardian sell her land in pursuance of the order of the court? We think this fact is found in the seventh finding. The following clause, "While it is found that the sale was made by said guardian under the order of the court of common pleas," is equivalent to a direct, affirmative finding of the fact that the sale was made pursuant to the order of the court, and that it is not affected by the explanation and suggestion of doubts. The court finds the fact, but says, in substance, that the evidence was not such as to enable it to reach its conclusion free from doubt, but that it is sustained by the preponderance of the evidence. The word "while," as used in the above finding, means simply "at the same time that." It might be omitted without changing in any way the meaning of the clause.

The sale thus found to have been made under the order of the court is found to have been reported to and approved and confirmed by the court at its following January term. The approval and confirmation of the sale by the court made the sale upon the facts found valid and final.

It is found by the court that the guardian, at the time of

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making the sale, conveyed the land to the purchasers. The conveyance was made before the sale was reported to or confirmed by the court. It was made without authority, and was, therefore, inoperative. It did not vest in the purchasers the title. *Maxwell v. Campbell*, 45 Ind. 360. But after the deed had been made, and after the sale had been reported and confirmed, and the guardian ordered to make a deed, the deed previously made was reported to and approved by the court. This, we think, rendered the deed, if otherwise sufficient, operative and effective to pass the title to the purchasers at and from the time of its approval. After the guardian was, by the confirmation of the sale and the direction of the court, authorized to make the deed, we can see no reason why she might not adopt the deed previously made. The report of the deed to the court, and its approval by the court, though previously executed without authority, would make it her deed, from the time it was so reported and approved, as effectually as if it had then been prepared and executed.

It was doubted, in the case above cited, whether the subsequent approval of a guardian's deed, made before the sale had been confirmed, would make the deed valid. But the guardian in that case was dead at the time the deed was approved, and it is obvious that the doubt expressed by the court rested upon that fact. Here the guardian was alive, brought the deed into court and asked that it be approved.

But the page of the order book of the court containing the order of sale was not inserted in the deed as required by the statute of 1863, 2 R. S. 1876, p. 531, and this omission, the appellant contends, renders it void. The court finds that the deed is in due form "except that it does not contain a reference to the page in the order book N. of the court where the order of sale is entered." If, in all other respects, except the insertion of the page of the order book, the deed is in conformity with the statute, does such omission render it void? The deed, when executed, would belong to the grantees, not to the appellant. The insertion in it of the page of

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the order book containing the order of sale could be of no benefit to the appellant. There is nothing in the statute which indicates that the insertion in a deed of the page of the order book is required and intended for the protection and benefit of the ward or heir. It can only protect and serve the convenience of the grantee. The order book is referred to in the deed as order book N. Nothing is omitted but the page on which the order of sale is entered. We think this omission should not be held to render the deed void.

In the case of *Atkins v. Kinnan*, 20 Wend. 241, relied upon by appellant, in passing upon an executor's deed, made under a statute requiring such conveyance to set forth the order of sale at large, COWEN, J., says:

"If we could feel ourselves warranted in the belief that no benefit whatever was intended by the recital to any except the grantee and those claiming under him, I, for one, should then have no difficulty in saying, that it is not for the plaintiffs to raise the objection.

"But the matter has not been thus regarded by the Legislature. It is true, as was said on the argument, that there is no express adjudication in this court, declaring the want of such a recital fatal to the conveyance. The farthest we have gone is in *Rea v. M'Eachron*, 13 Wend. 465, which avoids it for actual want of the surrogate's order of confirmation. A late statute has, however, gone farther. (2 R. S. 2d ed., 48, § 61 to 65 inclusive.)"

The sections of the statute referred to provide that when the conveyance omits to set forth the order at large, the chancellor shall make such order as to the deed as he may deem equitable, on its appearing to him that the sale was fair and made in good faith. The court held in accordance with the statute, that the deed was inoperative until confirmed by the chancellor. The case, we think, supports the conclusion we have reached. In this case the grantor describes himself as guardian, and that by the order of the court of common pleas of Wayne county, entered in order-book N, at page —,

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she, as such guardian, conveyed, etc. This recital shows sufficiently the authority under which the guardian was acting, and is quite as full as required by the common law. *Watson v. Watson*, 10 Conn. 77.

It is said that the sale was not in conformity with the order of sale. But the confirmation of the sale, however erroneous, was not void. It must be held good until set aside. *Maxwell v. Campbell*, *supra*; *Spaulding v. Baldwin*, 31 Ind. 376. Any departure from the order of sale shown by the record must be held to be cured by its confirmation.

We conclude that, upon the facts found by the court, the sale made by the guardian was not void; that the deed was, by its acknowledgment in and approval by the court, operative to convey the title of the appellant to the purchasers at her guardian's sale, and that, therefore, she was not entitled to judgment upon the findings.

The appellant also contends that the court below erred in overruling her motion for a *venire de novo*. This motion is based on the assumption that the facts found are vague and uncertain. It is also insisted that the mere evidence of facts is found and not the facts themselves. We think otherwise. The facts found show that the appellant's title was divested by the guardian's sale, and that the appellee's purchase was made under such circumstances as entitle him to protection. This was sufficient not only to enable him to defeat the action for partition, but to entitle him to an order quieting his title. The fact that the appellee purchased said property in good faith and for value, at a judicial sale under a lien adjudged superior to any lien of the appellant, is enough to show that she has no claim that she can assert as against him, and such finding is tantamount to a finding that she has no claim.

It is also urged that some of the facts found are blended with the conclusions of law, and for that reason the findings are improperly stated. All of the above recited facts are stated in the findings, and the mere fact that some of them may be recited in the conclusions of law will not affect the

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finding of facts; nor will it affect the conclusions of law, as such recital will be disregarded.

The motion for a new trial is urged upon the ground that the evidence does not support the finding. We have examined it carefully, and think the finding fully supported by it.

It is also insisted that the court erred in permitting the deed made to Winterling and Paulus to be read in evidence while the final record, showing that the sale was made to "Martischang and Paulus," remained unamended. It is said that the final record is the best evidence, and that it can not be contradicted by the report of the sale. We think there was no error in this ruling. The portion of the final record in this case, in which the name of "Martischang" occurred, purported to be a copy of the report of sale, and in connection with it the original report was properly read in order to determine to whom the sale was made.

It is also insisted that the original report was not admissible, because not identified by an entry upon the order-book of the court. This was unnecessary. It was on file among the papers, and as it purported to be the original report it was *prima facie* admissible.

A number of other questions are also discussed under the motion for a new trial, but as what we have already said decides them adversely to appellant, we will not again notice them.

We have now noticed all the questions in the record, and as there is no error in it the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellant's costs.

Filed Oct. 30, 1884. Petition for a rehearing overruled March 12, 1885.

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CRIMINAL LAW.—*Practice.*—*Sufficiency of Evidence.*—*Supreme Court.*—In criminal as in civil causes, where the evidence in the record tends to sustain the verdict on every material point, the Supreme Court will not reverse the judgment merely on the evidence.

SAME.—*Refusal of Instructions.*—*Error.*—There is no available error in the court's refusal to give an instruction, when the record shows that the substance and law of such instruction had been given the jury in the court's own instructions, nor where the instruction refused gave undue prominence to an isolated question in the cause, upon which the defendant's guilt or innocence of the offence charged did not necessarily depend.

SAME.—*Cross-Examination of Witness.*—*Discretion of Court.*—*Abuse of.*—*Supreme Court.*—How far the cross-examination of an adverse witness may be extended, in any case, is a question largely in the discretion of the trial court; and, unless the record shows an absolute abuse of such discretion, its exercise will not be reviewed by the Supreme Court.

SAME.—*Impeachment of Witness.*—*General Moral Character.*—*Cross-Examination.*—Under section 1803, R. S. 1881, in the impeachment of a witness, the subject-matter of the inquiry, whether upon the examination in chief or the cross-examination, is his general moral character; and where an impeaching witness has testified in chief that, as to one of the elements of moral character, the reputation of the party sought to be impeached is good, it is within the discretion of the trial court to allow such witness to be cross-examined in regard to the party's reputation as to any other or all of the essential and constituent elements of good moral character.

From the Criminal Court of Marion County.

R. B. Duncan, J. S. Duncan, C. W. Smith, J. R. Wilson, J. W. Gordon, L. O. Bailey, J. M. Cropsey and C. M. Cooper, for appellant.

F. T. Hord, Attorney General, W. T. Brown, Prosecuting Attorney, and C. F. Robbins, for the State.

Howk, J.—On the 15th day of August, 1883, an indictment was duly returned into the court below in this case, which charged, in substance, that the appellant, Gottlieb Wachstetter, and one Hogan McCarthy and William McCarthy, on the 6th day of July, 1883, at and in the county

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of Marion, and State of Indiana, did then and there, unlawfully and feloniously, steal, take and carry away a large amount of personal property, specifically describing each item thereof, consisting chiefly of legal tender treasury notes, silver certificates, and national bank notes, of different denominations and values, and a number of pieces of silver coin of American coinage, of different sizes and values, etc., of the moneys, personal goods and chattels of James Q. W. Wilhite, contrary to the form of the statute, etc.

Upon the appellant's arraignment and plea of not guilty, the issues as to him were separately tried by a jury, who returned into court the following verdict: "We, the jury, find the defendant guilty as charged in the indictment, and that he be fined in the sum of six hundred dollars, and be imprisoned in the State prison for a period of five years, and be disfranchised and rendered incapable of holding any office of trust or profit for a term of five years.

(Signed) "LOUIS B. WILLSEY, Foreman."

Over the appellant's motions for a *venire de novo* and for a new trial, the court rendered judgment against him upon and in accordance with the verdict.

In this court, errors are assigned by the appellant, as follows:

1. The overruling of his motion for a *venire de novo*;
2. The overruling of his motion for a new trial; and,
3. The error of the trial court, as alleged, "in allowing the State's attorney to cross-examine the affiants, whose affidavits were filed by the defendant below, in support of his motion for a new trial, before he was allowed to examine them."

The first question presented by the appellant's counsel, in argument, is the alleged insufficiency of the verdict. Counsel claim that "the verdict of the jury is contrary to evidence, and to law—contrary to law, because contrary to evidence." The only objection, pointed out by counsel to the verdict, is in reference to the amount of the fine assessed therein against the appellant. In section 1933, R. S. 1881, which defines the offence of grand larceny and prescribes its punishment,

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it is provided that whoever is guilty of grand larceny, as there defined, "upon conviction thereof, shall be * * * fined not exceeding double the value of the goods stolen," etc. The fine assessed against the appellant in the verdict of the jury, in the case at bar, as we have seen, was \$600. Appellant's counsel insist, with much earnestness and apparent confidence, that the jury were not authorized by the evidence appearing in the record, under the law, to assess the fine in this case at \$600. In other words, counsel claim as we understand them, that there is no evidence in the record which authorized the jury to find that the value of the goods stolen by the appellant, and described in the indictment, amounted to the sum of \$300.

The prosecuting witness, Wilhite, testified on the trial that when he went into the appellant's place of business, on Illinois street, in the city of Indianapolis, where the alleged larceny was committed, he had "between forty and sixty dollars" in money, in a little money-purse in his hip-pocket, on the left-hand side. He could not describe his money with much accuracy, but he knew he had one twenty-dollar bill and a ten-dollar bill. He did not know just how many five-dollar bills he had, but he thought at least two, if not three, five-dollar bills. He also had some silver change in his purse, but he could not recollect the amount of such change, or the number or size of the different pieces. This purse and its contents, together with the other personal goods described in the indictment, were stolen from the person of Wilhite, as the evidence tended to prove, while he was stupefied from the effects of a drink taken in the appellant's saloon, in an upper room of the saloon building. It is conceded by the appellant's counsel that the value of the goods stolen, exclusive of the money, was shown by the evidence to be \$250. It is claimed by counsel, however, that the jury were not authorized by the evidence appearing in the record to find the value of the money stolen to be more than \$22; that this sum, added to the value of the other goods stolen, makes the total

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value of all the stolen goods to be \$272; and that, therefore, the highest fine which the jury could lawfully assess against the appellant was a fine of \$544, instead of the fine actually assessed of \$600.

Appellant's counsel assume, as the basis of their calculation, that the evidence shows the amount of money in Wilhite's purse to have been \$42, and no more. They then claim that the jury were precluded by the evidence from taking into consideration the twenty-dollar bill in determining the amount of the fine, because the witness could not recollect what kind of a bill it was. He knew it was not a silver certificate, but that it was good money. The jury were justified by the evidence, we think, in finding that the note was either a legal tender treasury note or a national bank note, and it was not material which of the two the jury found it to be, as the indictment charged the larceny of a twenty-dollar bill of each kind. Besides, the question as to the value of the stolen goods was a question peculiarly within the province of the jury, as, indeed, are all other questions, whether of law or fact, in a criminal cause; for, under the 19th section of the bill of rights in our State Constitution, the jury are the ultimate judges of the law as well as of the facts in all criminal cases. *Keiser v. State*, 83 Ind. 234; *Fowler v. State*, 85 Ind. 538; *Nuzum v. State*, 88 Ind. 599.

It is manifest from the verdict of the jury in the case in hand, that they must have found the value of the stolen goods to be at least \$300. We can not say that there is no evidence in the record which sustains this finding as to the value of the stolen goods, and, therefore, we can not hold that the fine assessed against the appellant in the verdict of the jury is an illegal fine under the evidence, or under the law applicable to the evidence; on the contrary, we are of opinion that the verdict of the jury upon the point under consideration is sustained by the evidence, and, therefore, in strict accordance with law.

The next alleged error of which the appellant complains is

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the refusal of the court to give the jury the seventh instruction requested by him. This instruction reads as follows:

"If, taking all the evidence in the case tending to show whether the prosecuting witness, James Q. W. Wilhite, or some other person occupied the lounge, in the front room of the defendant's business place, up-stairs, at the time of the alleged larceny, and if, considering that evidence all together with all the evidence in the case, you shall have a reasonable doubt of defendant's guilt, you must acquit him."

There is no available error in the refusal of the court to give the jury this instruction, for the reason, if no other, that the substance and law of the instruction had been given the jury in much clearer and less confused language in the court's own instructions. *Harvey v. State*, 40 Ind. 516; *Graham v. Nowlin*, 54 Ind. 389. Besides, the instruction gave undue prominence to an isolated question in the case, upon which the appellant's guilt or innocence of the offence charged did not necessarily depend, and was properly refused on that ground. *Goodwin v. State*, 96 Ind. 550, 568.

The last error complained of by appellant's counsel is the action of the trial court in permitting the State's attorney to propound certain questions, upon cross-examination, to two of the appellant's witnesses, Thomas Stapp and Frank Wilson. One William Lee had testified on behalf of the appellant, and the State had introduced evidence tending to impeach Lee, by showing that his general moral character was bad. Stapp and Wilson were then called as witnesses by the appellant for the purpose of sustaining his witness Lee, by proving that Lee's reputation for truth and veracity was good. On cross-examination of Stapp, the State's attorney propounded to him, of and concerning Lee, the following questions:

"1. Did you hear of him being arrested in Hamilton county, Ohio, for grand larceny, and giving the name of William Smith? Ans. No.

"2. Do you know of his being in the station-house that week, in connection with a man here? Ans. No."

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To the witness Wilson the State also propounded, upon cross-examination, of and concerning Lee, the following questions:

1. "I will ask you, if you remember hearing his truth and veracity discussed in connection with a circumstance like this: In 1877 or 1878, do you remember of hearing it said, generally said, that he was connected with a number of men here who were knocking men down on the street, and a man was knocked down from Connersville, and the man arrested in Lee's cellar, with a lot of property, and Lee was arrested, and his story in regard to the transaction caused his reputation to be talked of among the policemen and people generally?"

2. "You never heard a discussion of the charges of robbery against him, and the story he told about them, and, in that connection, a discussion of his reputation for truthfulness?"

Negative answers were returned by the witness Wilson to each of these questions.

Of the questions propounded to the witness Stapp, appellant's counsel say: "The State had no right, upon cross-examination, to ask the witness what he had heard as to Lee's honesty, or whether he had heard of his having been arrested for larceny in Hamilton county, Ohio, or of his having been in the station-house." It is claimed that the State's questions to Stapp were improper, and that the court's ruling thereon was error, because "the only inquiry made by defendant was as to Lee's reputation for truth and veracity. No other particular trait of character was inquired into."

In *Ledford v. Ledford*, 95 Ind. 283, this court said: "A very wide latitude is necessarily allowable in the cross-examination of an adverse witness, and just how far it may be extended, in any particular case, is a question largely in the discretion of the trial judge." Of course, it is not meant by this, that it will not be error, in any case where the trial court may allow a party, upon cross-examination, to propound questions, clearly and palpably illegal and incompe-

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tent, to an adverse witness. But it was meant that, in every case, the error must be shown to be of such a wrongful and injurious nature and tendency, as to amount to an abuse of the court's discretion. In the case in hand, the argument of appellant's counsel, against the competency of the State's questions to the witness, Stapp, is based upon the assumption that the evidence in chief of the witness, that "Mr. Lee's general reputation for truth and veracity among his associates is good," did not open the door to a cross-examination by the State in regard to Lee's reputation for integrity or honesty. In other words, counsel imply, if they do not assert, that there is no proper or legal connection between a man's reputation for truth and veracity and his reputation for integrity or honesty; that, while he may have the reputation of being a thief and a highwayman, his reputation for truth and veracity may still be good.

We are not inclined to adopt this view of the question under consideration. Truth or veracity is a trait of the man of integrity or honesty; it is never a trait of the thief or robber. The reputation for dishonesty or criminal conduct is, we think, utterly inconsistent with a good reputation for truth and veracity. We mean, of course, such dishonesty or criminal conduct as was imputed to Lee in the questions propounded by the State to Stapp and Wilson, and complained of by the appellant. When Stapp and Wilson had testified that the reputation of Lee for truth and veracity was good, it was competent for the State to show, upon cross-examination, that Lee had been reputedly under arrest, or in the station-house, on a charge of felony. If the witness, Stapp, had answered the questions propounded to him by saying that he had heard of Lee's arrest for grand larceny, and of his giving the name of William Smith, and of his being in the station-house, such evidence would have been as inconsistent and as completely at variance with his evidence in chief, as it would have been if he had testified, on cross-examination, that he had heard that Lee's general reputation for truth and veracity

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was not good. If Stapp had answered the questions put to him by the State in the affirmative, his testimony would not, of course, have proved that Lee was guilty of the larceny mentioned therein; but such answers would have strongly tended to show that Stapp's evidence in chief was unworthy of belief.

In *McDonel v. State*, 90 Ind. 320, it was held by this court that where a witness testifies in chief that the reputation of a party is good with respect to some quality or disposition, it is competent to show, on cross-examination, that he has heard reports at variance with the reputation he has given the party. Truth is so nearly allied to honesty or moral soundness, it seems to us, that where a witness has testified in chief that the reputation of a party for truth and veracity is good, it is competent to ask him, on cross-examination, if he has not heard of a certain matter, which would seriously affect the reputation of the party for honesty and moral soundness, as being necessarily inconsistent and at variance with the reputation he had given the party. According to the best lexicographers of our language, at least, in this country, the words "truth," "veracity" and "honesty" are almost synonyms. each of the other, very nearly the same definitions being given to each of such words. We are of the opinion, therefore, that the questions propounded by the State to the witnesses, Stapp and Wilson, were germane to the subject-matter of their evidence in chief, to such an extent that they were clearly competent on cross-examination.

In *Oliver v. Pate*, 43 Ind. 132, in discussing a similar question to the one we have been considering, this court said: "It is difficult, if not impossible, to lay down specific rules to control or limit the cross-examination of witnesses. The judge before whom the case is tried must, to a considerable extent, determine it, and in doing so, must be governed by the circumstances attending the examination." Accordingly, in that case, the trial court having sustained objections to cross-examining questions somewhat similar to those pro-

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pounded to Stapp and Wilson, and there being "no statement in the bill of exceptions showing the circumstances under which the proof was offered," it was held by this court that, in sustaining the objections to such questions, there was no error shown by the record. This is all that was decided upon the question now under consideration in the case last cited, and, although it is cited and relied upon by appellant's counsel in support of their position in the case in hand, yet we are of opinion that there is no substantial conflict between the decision in that case and what we here decide.

Our criminal code provides, in section 1803, R. S. 1881, that "In all questions affecting the credibility of a witness, his general moral character may be given in evidence" Integrity or honesty, and truth or veracity, are all essential and constituent elements of good moral character. In the impeachment of a witness, the subject-matter of the inquiry, whether upon the examination in chief or the cross-examination, is his moral character. It would seem to follow, therefore, that where an impeaching witness has testified in chief, that, as to one of the elements of moral character, the reputation of the party sought to be impeached is good, it would be competent to cross-examine the witness in regard to the reputation of such party as to any other or all of the essential and constituent elements of good moral character.

We find no error in the record of this cause which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

ZOLLARS, C. J., thinks that too much latitude was allowed on the cross-examination of the witness Thomas Stapp.

Filed Nov. 25, 1884.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—Two general propositions are discussed in the brief on the petition for a rehearing. These propositions, stated in a condensed form, are:

First. The State having failed to prove that a twenty-dol-

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lar note taken from Wilhite was a national bank note or a treasury note, as alleged in the indictment, the jury committed a fatal error in taking that note into account in assessing the fine against the appellant.

Second. Conceding that it was proper to include the twenty-dollar note in the estimate, still, the value of the property taken did not exceed \$292, and, therefore, the jury erred in assessing the fine at \$600.

These propositions rest on assumptions of fact, and if these assumptions are erroneous, the foundation of the argument is sapped and the whole fabric must fall.

The evidence as to the twenty-dollar note was, in short, this: it was a note or bill, it was money, good money, and it was not a silver certificate. This, we are satisfied, authorized the presumption that it was either a national bank bill or a treasury note. This we say, because it is a matter of general knowledge that there are only three kinds of notes now circulating and recognized as good money, namely, silver certificates, treasury notes and national bank bills. It is not reasonable to presume that courts or juries can be ignorant of a fact so well and widely known, and it is an axiomatic principle that facts of which judicial notice is taken need not be proved.

The evidence upon the other proposition shows that the witness valued the articles taken at \$294; but he described the articles and added some facts increasing the value of some of them, and we can not say that the jury did wrong in estimating the articles at the value they did.

Counsel have not again discussed any of the other propositions decided, and we shall not again discuss them.

Petition overruled.

Filed Feb. 20, 1885.

State, *ex rel.* Nebeker, v. Sutton.

No. 11,121.

STATE, EX REL. NEBEKER, v. SUTTON.

COUNTY SCHOOL SUPERINTENDENT.—*Term of Office.*—A county superintendent of public schools, properly elected and qualified, will hold the office until his successor is elected and qualified.

SAME.—*Record of Election.*—*Evidence.*—The record of such election, made by the county auditor, is *prima facie* correct, and is *prima facie* evidence of such election.

SAME.—*Election.*—*Ballots.*—*Testimony of Trustees.*—When the township trustees agree that the election of such superintendent shall be by secret ballot, the election will be determined by the ballots actually cast, and in a suit regarding the validity of such an election the ballots are the best evidence, but when they have been lost, it is proper for the jury to consider the testimony of the trustees who cast the ballots, and of those who counted them and announced the result.

SAME.—*Instructions.*—The court should not charge, as a matter of law, that the testimony of the trustees casting the ballots is the best evidence, in the absence of the ballots.

SAME.—*Trustees.*—*Acquiescence in Announcement.*—Where the trustees agreed that the election should be by ballot, adhered to that mode throughout, and at the time the result was announced supposed the result was correctly announced, it was error to charge the jury that if the trustees adjourned without objection, an acquiescence in the result might be inferred, and that such an acquiescence would amount to an election.

INSTRUCTIONS.—*Harmless Error.*—The refusal of instructions, the substance of which is embraced in others given, is a harmless error.

SAME.—*Not Signed.*—The refusal of instructions, not signed by the party, or his attorney asking them, is a harmless error.

SAME.—*Contradictory.*—When the instructions are contradictory, etc., and tend to mislead the jury, the judgment will be reversed.

From the Warren Circuit Court.

T. F. Davidson and W. P. Rhodes, for appellant.

C. V. McAdams, J. McCabe and E. F. McCabe, for appellee.

ZOLLARS, J.—The relator instituted this action under sections 1131 and 1132, R. S. 1881, to settle the right to the office of superintendent of schools in and for the county of Warren. The averments of the complaint are substantially as follows: On the first Monday in June, 1881, the relator

99	300
134	696
99	300
137	91
99	300
144	196
99	300
159	87
99	300
167	329

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was duly and legally appointed and elected by the trustees of the several townships of the county superintendent of schools for the two succeeding years. He gave bond, qualified and took charge of the office, and was filling it and discharging its duties when the information herein was filed, on the 19th day of June, 1883. On the first Monday in June, 1883, the trustees of the several townships again met to elect his successor. There were five candidates for the place, among whom were the relator and appellee. As had been the custom theretofore, the trustees agreed that the election should be made by secret ballot, and that a majority of the twelve trustees should be necessary for an election. On the fifteenth and last ballot, six of the trustees voted for appellee, three voted for the relator, and three for Crawford, another candidate. One of the trustees, who acted as teller, either by mistake, design or accident, announced and called seven ballots for appellee, as having been cast for him, and the person who kept the count of the votes, by accident or mistake, credited to appellee one more vote than was cast for him, so that the result of the ballot was made to appear to the trustees to stand seven for appellee, two for Crawford and three for the relator. The trustees were thus lead to believe, and did then believe, that appellee had received seven votes, and was elected, when, in truth and in fact, he had received but six votes, and was not elected. Subsequent to this, and without any other election, appellee took the oath, filed his bond, and has since claimed, and wrongfully and unlawfully intruded himself into the office, and holds it against the relator, who claims the right to hold the office until his successor shall have been elected and qualified. Relator asks for a judgment declaring and establishing his rights to the office as against the claims of appellee. Upon this complaint, and an answer of general denial, the cause was submitted to a jury, and a verdict returned for appellee. The overruling of the motion for a new trial is assigned as error.

Upon the trial of the cause it was admitted that the rela-

State, *ex rel.* Nebeker, *v.* Sutton.

tor was duly elected superintendent of schools on the sixth day of June, 1881, to serve for the ensuing two years; that he qualified as such, and had performed and was performing the duties of the office at the time the information was filed, and that he still claims the right to hold the office by virtue of that election. The trustees were witnesses in the cause. Six of them testified that they voted for appellee on the fifteenth and last ballot. Three of them testified that they wrote their ballots, and voted for Crawford on that ballot. Three others testified that they wrote their ballots, and voted for the relator on that ballot. It is conceded that the trustees agreed to elect by secret ballot; that seven votes should be necessary to a choice, and that the voting was done by such ballot. Those who counted the ballots from the hat in which they were deposited by the trustees, testified that they were correctly called and counted.

It is contended by the relator that the court erred in refusing two instructions asked by him. It is contended by appellee that so far as they stated the law correctly, they were embodied in instructions given by the court; and further, that no error can, in any event, be predicated upon the refusal, because the instructions were not signed by the relator or his counsel, and that hence the court had a right to refuse them. The statute provides that when special instructions are desired by a party, they must be reduced to writing, numbered and signed by the party or his counsel. Section 533, R. S. 1881. That such instructions may be made a part of the record without a bill of exceptions, it is well settled that they must be so signed. And as the court can not know in advance by what mode parties may wish to make them a part of the record, the holdings have been that unless they are so signed they may be refused, and that such refusal will not be an available error. *Stott v. Smith*, 70 Ind. 298; *McCammack v. McCammack*, 86 Ind. 387.

We think with counsel for appellee, that so far as the instructions state the law of the case correctly, they are em-

State, *ex rel.* Nebeker, v. Sutton.

braced in those given by the court, and that hence the refusal was a harmless error, even if the instructions had been properly asked. In those refused the court was asked to charge the jury that the result of the election must be determined by the votes actually cast, and that seven was necessary to a choice; that if appellee did not, in fact, receive more than six votes, he was not elected, though it appeared that more than that number were reported or counted for him; that no accident or mistake, if any there were, could change the result; that the ballots, if they could be produced, would be the best evidence of the votes actually cast, but as they could not be produced, the best evidence of the votes cast by the trustees, and for whom cast, was the evidence of the trustees casting the ballots.

In the fourth and fifth instructions given by the court, the jury were charged, in substance, that if they should find that the election was to be by ballot, that seven votes were necessary to a choice, that appellee did not receive that number of votes, and that no further action was taken by the trustees in reference to such election, then no election was made, and the verdict should be for appellant; that in determining how many ballots were cast for appellee upon the last ballot, the ballots themselves, if they could be produced, would be the best evidence; but as they could not be produced, it was proper for the jury to consider the testimony of those who cast the ballots and those who saw the ballots as they came out of the hat in which they were collected; that the ballots actually cast must govern, irrespective of how those who cast them might have intended to vote.

To have charged the jury that the testimony of the trustees as to how they severally voted was the best evidence, would practically have been to exclude from them any consideration of the testimony of those who examined, called and counted the ballots from the hat. That the testimony of the trustees who cast the ballots was the best evidence, was a proper subject for argument to the jury, but it was not

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for the court to charge as a matter of law, that it was the best evidence. The jury were properly instructed that they should consider, not only the testimony of the trustees who cast the ballots, but the testimony also of those who counted the ballots from the hat. It was for the jury to say to whom credence should be given, and what was the most reliable testimony. If it be claimed that fraud intervened, it was for the jury to say upon what testimony they would rely in support of, or against that claim. If it be claimed that there was a mistake, it was for the jury to say from all the testimony, whether that mistake was upon the part of the trustees, as to the ballots they actually cast, or upon the part of those who counted them from the hat.

The record of the election of superintendent in 1883, as made by the county auditor, was introduced in evidence. The court charged the jury in relation to it, amongst other things, that such a record when made, as required by law, is *prima facie* correct, and will stand until overthrown by evidence showing that it is not true. We think there is nothing erroneous in this instruction. See *Reynolds v. State, ex rel.*, 61 Ind. 392.

The statute requires that the county auditor shall be clerk of such election, and shall keep the record thereof in a book to be kept for that purpose. Section 4424, R. S. 1881. This record is to serve some purpose. It is to be notice and evidence of something. If, in this case, the record had been the only evidence, it would clearly have made a *prima facie* case in favor of appellee, whom it shows to have been elected superintendent of schools. The presumption is that a public officer, charged with the performance of a public duty, will perform that duty honestly, faithfully, and truthfully, as the law requires. *Mills v. Board, etc.*, 50 Ind. 436; *Thompson v. Doty*, 72 Ind. 336.

To hold that a record which a public officer is required to make, and has made, is not *prima facie* correct, is to hold that the law has required a useless thing in requiring such a

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record to be made. The record here is doubtless such a record as is competent evidence under the code. Section 462, R. S. 1881. See *Wells v. State, ex rel.*, 22 Ind. 241; *Painter v. Hall*, 75 Ind. 208. If it is not *prima facie* evidence of what it contains, it is useless as evidence.

The sixth instruction given by the court is as follows: "If you should find that the chairman of the board of trustees declared the defendant duly elected to the office of county superintendent, and no objection was made thereto, and the board thereupon adjourned without taking further action in the appointment of such officer, you would have the right to infer that the board of trustees acquiesced in such announcement, and accepted the same as a discharge of their duty to make such appointment."

In the seventh instruction the court charged the jury that it was not essential that the election of a superintendent should be by ballot, and that if they should find that the trustees organized by selecting one of their number to act as chairman; that to determine their choice they balloted for the various candidates; that it was finally announced and declared by the chairman that appellee had received a majority of the votes, and was, therefore, duly elected; and that the announcement was acquiesced in by the board of trustees, and accepted by them as the discharge of their duty in the making of such appointment, then the appointment of appellee would be valid, even though the jury should find that it was made under a mistake of fact.

These instructions, taken together, amount to this: If the announcement and declaration of the chairman was acquiesced in by the board of trustees, then appellee was elected; and such acquiescence might be inferred from the fact that the chairman announced and declared the election, and the trustees adjourned without objection having been made as to the correctness of the announcement.

As applied to the evidence, these instructions do not state

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the law correctly, and were calculated to mislead the jury. The uncontradicted evidence was that the trustees under an arrangement that the election should be by secret ballot, and that seven votes should be necessary to an election, cast fifteen ballots. There is no evidence that upon the fifteenth and last ballot any of the trustees had any knowledge as to how the others voted. Upon this ballot two votes only were called and counted for Crawford. After the result of the ballot was announced, and appellee declared elected, the trustees adjourned without anything further having been done or said about the matter. After the adjournment, and the trustees had dispersed, three of them who had agreed among themselves to vote for Crawford upon that ballot, had a conversation in which each one claimed to have voted for him. This seems to have been the first discovery that the result of the ballot might not have been correctly announced.

The trustees were not compelled to adopt the secret ballot as the mode of election, but they did adopt that mode and adhered to it throughout. There is nothing to indicate in the slightest degree, that any other mode was adopted or thought of. The result was announced as the result of the fifteenth and last ballot. Nor is there anything in the evidence to indicate in any degree, that the trustees acquiesced in, or accepted, the announcement of the vote cast for appellee, and of his election, as anything else than as an announcement of the correct result of the ballot. There is nothing from which an inference could be drawn that the trustees abandoned the ballot as the mode of election, and acquiesced in, or accepted, the announcement of the chairman as the election. They did not understand that the announcement amounted to anything, except as a statement of the correct result of the ballot. From these instructions, the jury might readily understand that the announcement, unobjected to, operated as an election, regardless of what the correct vote might have been. Nor can it be said that the trustees acquiesced in or accepted the announcement as correct, when they

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had no knowledge upon the subject, and at that time no means of knowledge as to the correctness of the announcement. It was error, therefore, to instruct the jury that because the trustees were silent upon a matter about which they had no knowledge, or means of knowledge, they might infer an acquiescence on the part of the trustees.

It is true that the fourth and fifth instructions stated the law correctly, that the ballots actually cast must govern, but in the sixth and seventh under examination, an entirely different standard was adopted, and the acquiescence therein stated was declared to be sufficient to authorize a finding that appellee was elected. These instructions are irreconcilable in theory with the fourth and fifth. Taken all together, the instructions must have left the jury in doubt and uncertainty as to what the law applicable to the case was. When such is the case, the judgment must be reversed. *Somers v. Pumphrey*, 24 Ind. 231; *McEntire v. Brown*, 28 Ind. 347. See, also, *Toledo, etc., R. W. Co. v. Shuckman*, 50 Ind. 42.

It is contended by counsel for appellee, that whatever the holding upon the instructions may be, the judgment should not be reversed, because there is no evidence to show that the relator has the necessary qualifications to hold the office. We do not think that this contention can be maintained. It is admitted that the relator was duly elected in 1881, and at the time the information was filed was holding, and claiming to hold, the office by virtue of that election until his successor should be elected and qualified. As to him, the question in this case is not as to his qualification to hold the office, but as to whether or not he shall hold over, because no successor has been elected.

For the error in giving the sixth and seventh instructions, the judgment is reversed, with costs.

Filed Oct. 11, 1884. Petition for a rehearing overruled Feb. 14, 1885.

Hyland v. Milner et al.

No. 11,215.

HYLAND v. MILNER ET AL.

WITNESS.—*Cross-Examination.*—*Practice.*—On cross-examination a witness may be required to state particulars and details relative to material matters which he has stated generally, in chief, and it is error to refuse this right; and it is not necessary to inform the court of the facts expected to be developed by any such question.

SAME.—On cross-examination, acts of the witness, relevant to the subject-matter of the action, and inconsistent with his testimony, may be shown as affecting his credibility.

HUSBAND AND WIFE.—*Trust and Trustee.*—*Conversations.*—*Evidence.*—In a suit by a widow against a purchaser of lands upon execution against her deceased husband, in which she claims that her husband held the lands in trust for her, she can not testify to conversations with him during life touching the matter.

From the Spencer Circuit Court.

C. L. Wedding and *E. M. Swan*, for appellant.

C. A. DeBruler, for appellees.

ELLIOTT, J.—This case is here for the second time. The pleadings and the rulings made in the formation of the issues are fully reported in *Milner v. Hyland*, 77 Ind. 458. The principle declared in that case is, that a purchaser at a sheriff's sale, although the sale is made on his own judgment, will hold the land as against the claim of a wife who had furnished the money with which to buy the land, but had permitted the husband to take and hold the title in his own name. It is, however, necessarily implied that the purchase must be made without knowledge of the equities of the wife who furnished the money which paid for the property. The doctrine laid down in the opinion on the former appeal has received the sanction of the court in many cases decided since that decision was rendered. *McMillan v. Hadley*, 78 Ind. 590; *Westerfield v. Kimmer*, 82 Ind. 365; *Sansberry v. Lord*, 82 Ind. 521; *Heck v. Fink*, 85 Ind. 6, see p. 9; *Paulus v. Latta*, 93 Ind. 34. The questions presented by this appeal arise on the ruling denying a new trial.

On the trial of the cause the appellant introduced evidence

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showing that she furnished to her husband the money with which the land in controversy was purchased, and there was also evidence fully warranting the inference of an agreement on the part of the husband to hold the land for the benefit of the wife. The appellant admitted that the judgments against her husband had been rendered as claimed by the appellees; that executions had been issued and levied, and that a sale of the land had been duly made and a deed issued to the appellees, who purchased at the sale. Robert T. Kercheval was introduced as a witness on the part of the defence, and testified that he was a member of the Rockport Banking Company at the time of the transaction in which the debt of the appellant's husband was contracted; that he bid off the property for the partnership of which he was a member, and that he had no notice whatever of the claim of the appellant. Isaac L. Milner, another member of the partnership, gave similar testimony, and the defence then rested. Mrs. Hyland was called in her own behalf, and testified, among other things, that she told Mr. Bullock, a member of the Rockport Banking Company, shortly after her husband's death in November, 1874, that the land was her property, and had been paid for with her money. She also testified that Bullock replied that her husband had told him that the property belonged to her. After the close of the evidence offered in reply, the appellees recalled Mr. Kercheval, who testified, on his direct examination, as follows: "The first organization of the Rockport Banking Company ceased by limitation on the last day of December, 1874, and it was re-organized on January 1st, 1875. George B. Bullock did not go into the new firm, so his connection with it ceased on December 31st, 1874. I don't think he was a member afterwards, but his money remained there and assets and claims standing out, the full amount due him on dissolution being ascertained and set apart for him in cash. He subsequently took it away. He had no interest in the uncollected assets." The appellant, as the first question on cross-examination, asked the witness: "If it was

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not a fact that George B. Bullock had not withdrawn his assets from the company, and that he still retained his interest after the first day of January, 1875, in the assets and property of the firm of which the judgment against James Hyland was a part, which had not been fully settled." We think the question was a proper one on cross-examination. It was competent for the appellant's counsel to enter into the details of the subject-matter opened up by the examination in chief, and they were not restricted to the statements made in general terms by the witness in his answers to the questions asked on the direct examination. They had a right to demand, within reasonable limits, details and particulars, and were not to be put off with mere general statements. 'A cross-examination is important not only as a means of getting out in full detail all the facts within the range of the subject-matter of the direct examination, but it is also an important means of testing the memory of a witness, as well as a potent means of ascertaining the truth of his statements. It is very clear that the trial court erred in denying the appellant the right to ask the question submitted by her counsel.

It is not necessary on cross-examination to state what facts it is expected the answer will elicit; on the direct examination this is essential, but not on the cross-examination. *Wood v. State*, 92 Ind. 269; *Harness v. State, ex rel.*, 57 Ind. 1. All that it was necessary for the appellant to do was to ask a material question in a proper manner, and if the question was material and competent on cross-examination, the error in excluding it is sufficiently shown, without making a statement of what facts the examining counsel expected to prove.

In this instance the interrogatory bore upon one of the most material points in the case, for the question whether the purchasers had notice of Mrs. Hyland's claim was one of vital importance. The interrogatory was fully within the subject-matter of the direct examination, and the error in denying the right to propound it to the witness is plainly exhibited.

It is, however, contended that if there was error in refusing

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to allow the appellant to secure an answer to the interrogatory propounded to Kercheval, it was rendered harmless by the fact that the witness subsequently voluntarily made this statement: "G. B. Bullock did not immediately withdraw the money due him on dissolution of the firm on December 31st, 1874; I put the money for him in an envelope and put it away in the safe at the office of the bank, and he got it afterwards." We do not regard this statement as curing the error, for it does not embrace all the matters called for by the interrogatory, so that even conceding, but by no means deciding, that an error in restricting a cross-examination can be cured by a statement of the witness, still, the error in this particular instance was not rendered harmless. But we do not think that it is possible to escape the consequences of such an erroneous ruling upon the ground that the statement called for by the question has already been made in general terms, for one of the great purposes of a cross-examination is to get at the correctness of the statements made on the direct examination, and it would frustrate this purpose if the cross-examiner could be put off upon the ground that the witness had already made the statement which the interrogatory would likely elicit. It would be cold comfort to a cross-examiner to be denied a right, and then have the denial justified on the ground that a general statement was made by the witness which covered the whole subject. This would be bad enough in any case, but especially bad where, as here, the witness is one of the adverse parties.

The appellant introduced Wilmer Hyland as a witness, who testified that the money with which the property was purchased belonged to her, and also to facts tending to show an agreement with the husband to hold the property for her. On cross-examination he was asked if he did not bid at the sheriff's sale. We regard as correct the ruling permitting the appellees to ask this question. As the real estate was levied upon and offered for sale as the property of the appellant's husband, and as the witness in bidding impliedly recognized the

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property as the husband's, the question was likely to, and in fact did, elicit an answer affecting the credibility of the witness. It is always proper on cross-examination to show that the witness has said, or has done, things inconsistent with his statements on the witness stand. It is to be noted, however, that his acts or declarations must always be connected with the subject-matter of the action, for purely collateral matters can not be enquired into. In this case the matter was closely relevant to the subject of the action.

There was no error in refusing to permit Mrs. Hyland to testify as to conversations held with her husband prior to his death, and prior to the time the rights of the appellees accrued. R. S. 1881, section 499.

For the error in erroneously restricting the cross-examination the judgment must be reversed.

Filed Jan. 2, 1885.

No. 11,863.

BAKER ET AL. v. WAMBAUGH.

JUSTICE OF THE PEACE.—*Judgment.*—*Injunction.*—The right of a justice of the peace, acting under color of appointment, to fill a vacancy, can not be questioned by a suit to enjoin the collection of a judgment by him rendered.

From the Sullivan Circuit Court.

W. C. Hultz, for appellants.

C. E. Barrett and *J. C. Briggs*, for appellee.

BICKNELL, C. C.—The appellee brought this suit against the appellants to enjoin proceedings upon a judgment of a justice of the peace.

The complaint averred that the defendant Baker was the constable, and the other defendants were the two justices of the peace of Jackson township, in Sullivan county; that the defendant Frakes had been regularly elected and qualified as his own successor in office; that in April, 1882, one Bell

99	312
135	280
99	312
148	166

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had been elected as the successor in office of the other justice, James M. Clark, who had been duly elected and qualified as a justice in April, 1878, but that said Bell never gave bond and never was qualified, and said Clark never resigned; that in 1883 the board of commissioners of Sullivan county appointed Claiborne Wood to fill the supposed vacancy in the office held by said Clark, and he was duly qualified and acted as Clark's successor, and obtained from Clark his official docket and papers, and while so acting tried the plaintiff on a charge of unlawful provocation, and rendered a judgment against him for a fine of \$1 and also for costs; that Wood then removed from Sullivan county and deposited his docket with said Frakes, who issued execution on said judgment; that afterwards, in April, 1884, the defendant Isaiah Hoggatt was duly elected a justice of said township and was qualified, and then the docket of said Clark, which he had delivered to the appointee, Wood, and which Wood had deposited with Frakes, was transferred by Frakes to said Hoggatt; that the defendants Baker and Frakes and Hoggatt are threatening to levy said execution; that the judgment and all the proceedings thereon are void, because at the time the judgment was rendered, Wood was not a justice, and the only justices of the township at that time were Frakes and Clark, the former having been duly elected and qualified as his own successor, and the latter holding over until his successor should be elected and qualified. The complaint prayed for a restraining order and also for a perpetual injunction.

The record shows that a restraining order was granted, and that the defendants moved to dissolve it, and that said motion was overruled, and that the defendants excepted, and that then the defendants' attorney withdrew his appearance, and the defendants were defaulted, and a perpetual injunction was awarded pursuant to the prayer of the complaint. The defendants appealed. They assign errors jointly as follows:

1. That the complaint does not state facts sufficient to constitute a cause of action.

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2. That the court erred in rendering judgment for the appellee on a complaint that did not state facts sufficient to constitute a cause of action.

3. Error in overruling the plaintiff's motion to dismiss the restraining order.

4. Error in overruling appellants' motion to dissolve the restraining order.

The third and fourth of these specifications present no question. The defendants, by withdrawing their appearance, withdrew also their motions, and left the cause as if there had been no appearance. *Lodge v. State Bank*, 6 Blackf. 557; *Gunel v. Cue*, 72 Ind. 34; *Terrell v. State, ex rel.*, 66 Ind. 570; *Young v. Dickey*, 63 Ind. 31.

The first and second specifications of error are substantially the same; the question presented is whether the complaint shows that the judgment complained of was void.

Section 14 of article 7 of the Constitution of Indiana provides that "A competent number of justices of the peace shall be elected by the voters in each township in the several counties. They shall continue in office four years."

Section 3 of article 15 of the said Constitution declares that, "Whenever it is provided in this Constitution, or in any law which may be hereafter passed, that any officer, other than a member of the General Assembly, shall hold his office for any given term, the same shall be construed to mean that such officer shall hold his office for such term and until his successor shall have been elected and qualified."

Justices of the peace are required to give an official bond. R. S. 1881, section 1421. A failure to give bond within ten days after the commencement of the term of office and the receipt of the certificate of election, vacates the office. R. S. 1881, section 5527. And a vacancy may be created by the acceptance of another incompatible office, *Mehring v. State, ex rel.*, 20 Ind. 103, or by abandonment, and in many other ways. *State, ex rel., v. Allen*, 21 Ind. 516. And the existence of the vacancy in any case depends upon the facts and cir-

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cumstances attending it. *Ibid.* And "Whenever a vacancy occurs in the office of justice of the peace, it shall be the duty of the board of commissioners of the county in which such vacancy may occur to fill the same by an appointment; which appointment shall be certified to the governor by the auditor of said county, and upon said certificate of appointment being filed with the governor, he shall commission the person so appointed as justice of the peace, to serve until his successor is elected and qualified." R. S. 1881, section 5564.

Under this last mentioned statute, Mr. Wood was appointed by the county board. The appellee claims that the appointment was unauthorized, because, inasmuch as Mr. Clark was elected his own successor, and failed to be qualified, he had a right, under the constitutional provision above cited, to hold over until a successor should be elected and qualified, so that there was, in fact, no vacancy when Mr. Wood was appointed, and his appointment and all his acts as a justice were without jurisdiction.

This proposition can not be sustained. It was held in *State, ex rel., v. Hadley*, 27 Ind. 496, that where an officer was elected his own successor, and received his commission, and another person was appointed five days afterwards, there was no vacancy to be filled by appointment, because such elected officer had ten days after the receipt of his new commission within which to be qualified as his own successor, and in the meantime was authorized to hold over.

But the complaint in the present case shows that Bell was elected Clark's successor in April, 1882, and was never qualified; then as to Clark the allegation is merely that he never resigned. This allegation does not show that Clark was still holding the office. If Bell failed to be qualified in proper time, Clark might have continued to serve, and might, also, have abandoned the office if he chose to do so.

The complaint further shows that a year afterwards the county board, deeming the office formerly held by Clark vacant, appointed Wood.

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In *Stocking v. State*, 7 Ind. 326, this court said: "There is no technical nor peculiar meaning to the word 'vacant,' as used in the Constitution. It means empty, unoccupied; as applied to an office, without an incumbent. There is no basis for the distinction urged, that it applies only to offices vacated by death, resignation, or otherwise."

In *Urmston v. State, ex rel.*, 73 Ind. 175, it was held in an action against the sureties on an official bond, that, in the absence of sufficient averments to the contrary, the presumption is that an official term ends with the time prescribed for it; and to the same effect is *Naugle v. State, ex rel.*, 85 Ind. 469. The complaint in the present case shows that the office was, in fact, vacant as to Clark, and that he was not claiming to hold over. The averment is that he delivered up his docket and official papers to Mr. Wood, the appointee. In *State, ex rel., v. Jones*, 19 Ind. 356, PERKINS, J., in the opinion of the court, said:

"We think the following propositions are deducible from the judicial decisions of the Supreme Court of Indiana:

"1. Where it appears, *prima facie*, that acts or events have occurred subjecting an office to a judicial declaration of being vacant, the authority authorized to fill such vacancy, supposing the office to be vacant, may proceed, before procuring a judicial declaration of the vacancy, and appoint or elect, according to the forms of law, a person to fill such office; but if, when such person attempts to take possession of the office, he is resisted by the previous incumbent, he will be compelled to try the right, and oust such incumbent, or fail to oust him, in some mode prescribed by law.

"2. If such elected or appointed person finds the office, in fact, vacant, and can take possession, uncontested by the former incumbent, he may do so, and so long as he remains in such possession, he will be an officer *de facto*; and should the former incumbent never appear to contest his right, he will be regarded as having been an officer *de facto* and *de jure*; but should such former incumbent appear, after possession has been taken against him, the burden of proceeding

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to oust the then actual incumbent will fall upon him; and if in such proceeding it is made to appear that facts had occurred before the appointment or election justifying a judicial declaration of a vacancy, it will be then declared to have existed, and the election or appointment will be held to have been valid."

In *Gumberts v. Adams Ex. Co.*, 28 Ind. 181, it was held that where one is in the exercise of an office in which the public is concerned, his authority as an officer in the performance of official acts can be questioned only in a direct proceeding to contest his right to hold the office. See, also, to the same effect, *Creighton v. Piper*, 14 Ind. 182; *People v. Stevens*, 5 Hill, 616; *Green v. Burke*, 23 Wend. 490; *People v. White*, 24 Wend. 520.

The complaint, therefore, did not state facts sufficient to constitute a cause of action; it showed upon its face that Wood was an officer *de facto*, at least, whose official character can not be questioned in this proceeding. *Mowbray v. State, ex rel.*, 88 Ind. 324. The judgment, therefore, ought to be reversed and the injunction dissolved.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things reversed, and this cause is remanded with instructions to dissolve the injunction.

Filed Sept. 25, 1884. Petition for a rehearing overruled Jan. 22, 1885.

No. 10,065.

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DEED.—*Execution of.*—*Delivery an Essential Requisite.*—The delivery of a deed is an indispensable requisite of its due execution; the deed takes effect from its delivery, and though signed, sealed and acknowledged in proper form, if it pass into the grantee's possession without delivery by the grantor, it will not operate, as between the parties thereto, to convey the title to the real estate described therein.

99	817
136	67
99	317
155	355
99	317
157	668
99	317
162	161

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SAME.—*Voluntary Unrecorded Deed.*—*Delivery after Grantor's Death.*—*Testamentary Disposition.*—*Rights of Grantor's Creditors.*—*Relation.*—Where the grantor signs and acknowledges a voluntary deed to his children as grantees, in consideration of natural love and affection, and, without having such deed recorded in the proper recorder's office, seals it up in an envelope and deposits the same with his agent to be delivered to the grantees after his death, and where such deed by its terms is not to take effect until after the grantor's death, the deed is an attempted testamentary disposition of the land described therein, and, if not executed with the legal formalities of a will, is inoperative to pass the title to the land to the grantees. And where the grantor dies insolvent long after he placed such deed in the hands of his agent, the subsequent delivery of the deed will be ineffectual to defeat the rights of the grantor's creditors and administrator to sell the land for the payment of his debts; for the rule is that the doctrine of relation, which alone could give effect to such deed, will not be permitted to apply so as to do wrong or injury to strangers to the deed.

From the Carroll Circuit Court.

J. L. Miller, M. Jones, F. B. Everett and M. W. Miller, for appellant.

W. D. Wallace and A. A. Rice, for appellees.

Howk, J.—On the 24th day of April, 1878, George B. Rash, then the administrator of William Loveless, deceased, filed in the clerk's office of the Tippecanoe Circuit Court his verified petition, wherein he alleged, in substance, that his decedent died intestate; that the personal estate of the decedent, with his real estate previously sold and ordered to be sold, would amount to about the sum of \$3,000; that the decedent's debts, so far as they had come to the administrator's knowledge, amounted to about the sum of \$8,000, showing an insufficiency of the personal estate, including the lands already sold and ordered to be sold, of about \$5,000; that the decedent died on the 4th day of June, 1876, the owner in fee simple of certain real estate, particularly described, in Tippecanoe county, Indiana, containing 150 acres, more or less, of the appraised value of \$4,500, as shown by the inventory and appraisal thereof filed with, and made a part of, such petition; that the decedent left surviving him Terressa Loveless,

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his widow, Nora Loveless, a posthumous child then eighteen months old, and Frances Hudson, Thomas, John E., Sarah, Edwin V., William W. and Moses B. Loveless, his children, of lawful age, as his only heirs at law; that, on the 8th day of April, 1869, the decedent, William Loveless, then in full life, and Terressa, his wife, executed, and on April 9th, 1869, acknowledged, a deed of conveyance to the above named Frances Hudson, and Thomas, John E., Sarah, Edwin V., William W. and Moses B. Loveless, for the aforesaid 150 acres of real estate, which deed of conveyance was sealed up and left in the hands of said George B. Rash, "he not knowing what was enclosed until after his appointment as administrator as aforesaid, when it was opened and taken by a portion of the grantees therein named, and, on the 24th day of June, 1876, recorded in the records of deeds of Tippecanoe county." A certified copy of such deed was filed with, and made part of, the petition.

The administrator of the decedent further averred that such deed of conveyance was never delivered by the decedent, and was without consideration and void as to his creditors, and the real estate described therein was liable and ought to be sold, under an order of the court, for the payment of the debts of the decedent's estate; that the decedent left no other real estate, except that sold and ordered to be sold, and except, also, the 150 acres of land described in such petition; and that the decedent's estate, after the sale of all such real estate, would be insolvent.

The administrator of the decedent, therefore, prayed that the heirs at law of such decedent might be made defendants to such petition, and notified of its pendency; that the deed of conveyance therein described might be declared void, and the real estate described in such deed might be declared liable and bound for the payment of the debts of the decedent's estate, and for an order for the sale of the same accordingly; and that the administrator might be authorized, by an order of the court, to settle such estate as insolvent.

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The heirs at law of the decedent, except his widow Terressa, and his posthumous child Nora, appeared and filed their cross complaint, claiming that under the deed of conveyance mentioned in the administrator's petition, they were the owners of the real estate therein described in fee simple, and praying that their title thereto might be forever quieted and set at rest as against the administrator and creditors of the decedent's estate, and as against the said Terressa and Nora Loveless.

Issues were joined upon the administrator's petition and, also, upon such cross complaint, and were submitted to a jury for trial, and a verdict was returned in substance as follows: "We, the jury, find for the petitioner on the issues joined, and that the personal estate of William Loveless, deceased, is insufficient to pay the debts of his estate, as stated in the petition, and that it is necessary to sell the real estate described in the petition to pay said debts." Upon the foregoing verdict, the court ordered and adjudged that the personal estate of the decedent was insufficient to pay the debts of his estate; that he died seized in fee of the real estate described in his administrator's petition; that the deed of conveyance set up by the defendants in their cross complaint was invalid, and that it was necessary to sell such real estate to pay the decedent's debts, and the administrator was ordered to file an inventory and appraisement of such real estate, as required by law.

Afterwards, the cross complainants moved the court for a new trial as a matter of right under the statute, which motion was sustained by the court, and to this ruling the administrator excepted. He then moved the court in writing to vacate and set aside its order, awarding the cross complainants a new trial as of right, which motion was overruled by the court, and to this decision the administrator excepted and filed his bill of exceptions.

And thereafter, on January 15th, 1881, upon the application of the cross complainants, the venue of the cause was changed to the court below.

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Before the venue was thus changed, it was suggested to the court that the administrator, George B. Rash, had resigned the duties of his trust, and that the appellant, Mark Jones, had been duly appointed and qualified as administrator *de bonis non* of the decedent's estate; and thereupon it was ordered that the said Mark Jones be substituted as the petitioner and plaintiff in this cause, which was done accordingly.

In the court below, the issues joined were again tried by a jury, and a verdict was returned, finding against the appellant, upon the issues joined on his petition, and finding for the cross complainants, upon the issues joined on their cross complaint, that they were the owners of the real estate in controversy, at the time of the death of their father, William Loveless, deceased. Over sundry motions of the appellant, the court adjudged and decreed, in accordance with the verdict, that the cross complainants were, at the time of the death of appellant's intestate, William Loveless, the owners in fee simple of the real estate in controversy, and that their title to such real estate should be quieted and forever set at rest, etc.

In this court, the appellant first complains of the alleged error of the court in overruling his demurrer to the appellees' cross complaint. All the heirs at law of the appellant's intestate, except his widow and his posthumous child, united in the cross complaint, and alleged therein, that on the 8th day of April, 1869, their father, William Loveless, then in life, was the owner in fee simple and in possession of the real estate in controversy; that, being such owner, the said William Loveless, on the day and year last named, and his wife Terressa, made, signed and acknowledged their warranty deed conveying to the cross complainants the real estate aforesaid, subject to the reservation contained in such deed; that, immediately after thus making, signing and acknowledging such deed, the said William Loveless delivered the same to his nephew, Edward J. Loveless, with directions to hold the

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same for the cross complainants, the grantees therein, during the lifetime of said William Loveless, and at his death to deliver the same to the cross complainants; that the said Edward J. Loveless accepted such deed and held the same, under the directions aforesaid, until the fall of 1874, when, on account of failing health, he was about to remove to the State of California; that shortly before the departure of Edward J. Loveless for California, the said William Loveless removed the said deed from the former's possession, with his consent, and placed the same in the hands of George B. Rash to be held by him for the cross complainants, during the lifetime of said William Loveless, and at his death to be delivered by him to the cross complainants; that said Rash accepted such deed, for the uses and purposes aforesaid, and held the same for the cross complainants from that time forward, without interruption, until a short time after the death of William Loveless, on the 4th day of June, 1876, when the said Rash delivered the same to and for the cross complainants, and that afterwards, on the 24th day of June, 1876, the cross complainants caused such deed to be recorded in the recorder's office of Tippecanoe county.

And the cross complainants further alleged that the said William Loveless died intestate on the day and year aforesaid, leaving his widow Terressa, his posthumous child Nora, now an infant of two years, and the cross complainants, all of full age, as his heirs at law; that, by reason of the facts aforesaid, the cross complainants were the sole and exclusive owners of the real estate in controversy; that, notwithstanding such facts, the administrator of the estate of William Loveless, deceased, was then claiming that such real estate was liable to be made assets of the decedent's estate, and, to that end, was subject to be sold for the payment of the decedent's debts.

Wherefore the cross complainants prayed that their title to the real estate in controversy might be forever quieted and set at rest, and that they might be adjudged to be the owners

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thereof in fee simple, free from all demands of the creditors of the decedent's estate, and that they might have all other proper relief.

The deed referred to, as well in the administrator's petition as in the appellees' cross complaint, was a deed of general warranty under the statute of this State. It bore date on the 8th day of April, 1869, and was acknowledged by the grantors before a notary public on April 9th, 1869; and the consideration expressed therein was "natural love and affection, and the reservations hereinafter made, and for one dollar." The reservations referred to were thus expressed in the deed: "Saving and reserving to the said William Loveless the right to hold and use and dispose of the rents and profits of said real estate during the term of the life of said William, the grantor, in such manner as he, said William, deems proper, the said William to pay taxes during said life-estate."

The questions presented for our decision by the alleged error of the court in overruling the appellant's demurrer to appellees' cross complaint, may be thus stated: Do the facts stated in such cross complaint show a cause of action in favor of the appellees as the heirs at law of William Loveless, deceased, as against the creditors of such decedent? Or, in other words, did the voluntary deed of William Loveless to his children, the appellees, upon the facts alleged in their cross complaint, operate to convey to them the real estate in controversy, discharged and freed from the grantor's debts and the claims of his creditors? Do the facts stated show that the deed described in the petition and cross complaint was ever delivered by the grantor William Loveless, or by his authority, to the grantees named therein? If such delivery is shown by the facts alleged, when should or did the deed take effect and become operative as between the grantees and the creditors of the grantor, William Loveless? These are troublesome questions, but, upon the answers which must be given to them, depends the proper decision of this case.

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Do the facts stated by the appellees show a delivery of the deed by the grantor William Loveless? This is the first question we are required to consider and decide. It is elementary law that a deed is not executed until it is delivered by the grantor. In *Tharp v. Jarrell*, 66 Ind. 52, it was said by this court: "It needs hardly to be said that the delivery of a deed, by the grantor to the grantee, is an essential part of its execution. Without such delivery, a deed of conveyance, though signed, acknowledged and recorded, is wholly inoperative, and passes no title whatever to the premises therein described." There is some contrariety of opinion in the adjudged cases in regard to what acts or words will constitute the delivery of a deed by the grantor to the grantee; but all the cases and all the law-writers, so far as we are advised, agree that the delivery, actual or presumptive, of a deed by the grantor to the grantee, with the intent thereby to give effect to such deed, is indispensably necessary to its validity. 3 Washb. Real Prop. (4th ed.) p. 286. It has been held that "Where the deed to a child is absolute in form and beneficial in effect, and the grantor and father voluntarily causes the same to be recorded, this is in law a sufficient delivery to the infant, and the title to the lands conveyed will pass thereby." *Cecil v. Beaver*, 28 Iowa, 241. But even in such a case, it was held by this court, in *Vaughan v. Godman*, 94 Ind. 191, that it was competent for the grantor and father to controvert the implied, constructive or presumptive delivery of the deed to his infant child, growing out of the facts of his causing the deed to be recorded and its beneficial effect, by alleging and proving that he had never, in fact, delivered such deed to his infant child, with the intent thereby to give it effect as a conveyance to her of the premises described therein. *Fitzgerald v. Goff*, *ante*, p. 28.

It is manifest, however, that the doctrine declared in *Cecil v. Beaver*, *supra*, can have no application to the case in hand. For here, as shown by the averments of appellees' cross complaint, the grantor and father never caused the deed to be re-

corded, and his children, the grantees, were alleged to be of full age.

We are of opinion that the facts stated by the appellees in their cross complaint show conclusively that their father and grantor, William Loveless, never, in fact, delivered to them the deed therein described, and that the alleged delivery of such deed, after the death of the grantor, was wholly unauthorized and inoperative to give effect and validity to the conveyance. It was alleged in the cross complaint that the grantor William Loveless, in the fall of 1874, placed the deed in the hands of George B. Rash, to be held by him for the cross complainants during the grantor's lifetime, and at his death to be delivered by Rash to the grantees therein; that Rash accepted such deed, and held the same for the cross complainants from that time forward until shortly after the death of the grantor; and that Rash then delivered the deed to the cross complainants, the grantees therein. These facts show that William Loveless verbally authorized Rash, as his agent, to do the things mentioned. Upon the death of Loveless the authority was thereby revoked, and Rash ceased at once to be the decedent's agent for any purpose, and therefore could not, for the deceased grantor, deliver the deed. Besides, the deed upon its face was not to take effect until after the grantor's death. It was an attempted testamentary disposition of the grantor's land, and was not executed with the requisite formalities of a will, and was, therefore, inoperative to pass the title to such land. Under the averments of the cross complaint, it seems to us, that William Loveless, notwithstanding such deed, died seized of the land in controversy; that the appellees took their title to such land, not under the deed, but by descent; and that they were not entitled to have such title quieted as against the administrator of such decedent. Our conclusion is, therefore, that the court clearly erred in overruling the demurrer to appellees' cross complaint.

This conclusion renders it unnecessary for us to consider any

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of the other errors assigned, or to decide any of the questions thereby presented. In view, however, of the fact that the views we have expressed may seem to be in conflict with many of the adjudged cases elsewhere, it may not be improper for us to notice briefly some of the peculiar features of the case in hand, as shown by the record. We have already seen that the deed, under which appellees claim, was executed more than seven years prior to the death of the grantor, William Loveless, and that such deed was never recorded, by his procurement or otherwise, in the recorder's office of the proper county, until about three weeks after his death. The reservations in the deed show very clearly that the grantor did not intend it to take effect or become operative for any purpose during his natural life. It is apparent, also, that the grantor had control of the deed at all times, and, long after its execution, claimed and exercised the right and power to take and remove it from the possession of the first depository, and place it in the custody of another person. The last depository, George B. Rash, was a witness for the administrator on the trial, and testified, substantially, as follows: Several years before William Loveless died he brought a sealed package and handed it to me, and said, "take care of this for me." (I have a safe, and the whole neighborhood makes a depository of it.) It was a yellow envelope, legal size, sealed up and endorsed "William Loveless' papers." He gave me no directions at all about the package, only left it to be taken care of for him; that is all he said to me. He never told me what was in the envelope; and I didn't know at the time of his death what it contained. After I became administrator of his estate I opened the envelope and found the deed in it, and a day or two afterwards I handed it to the grantees.

The record shows that between the date of the deed and the date of its assumed delivery, after the death of the grantor, he became and died insolvent, and the rights of his general creditors, and of his administrator as their representative, in-

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tervened and attached to the real estate in controversy. Manifestly, the deed of such real estate, assuming that the last depositary had the right, after the grantor's death, to hand it to the grantees, could only be upheld by invoking the aid of the doctrine of relation. It has been held, however, and correctly so, we think, that the doctrine of relation shall not be suffered to prevail to the wrong or injury of intervening creditors. Thus, in *Goodsell v. Stinson*, 7 Blackf. 437, this court said: "The delivery of a deed is an essential requisite to its validity, and it is from the delivery that the deed takes effect. A deed may be delivered to a third person even a stranger, for the benefit of the grantee, and if he afterwards assent to the act, the deed will take effect from the date of its delivery, unless the rights of third persons should be affected by it. In that event the doctrine of relation would not apply, for it is a general rule that it shall not be permitted to apply so as to do wrong to strangers; as between the parties to the deed, it may be adopted for the advancement of justice." The case cited was approved and followed, upon the point under consideration, in *Woodbury v. Fisher*, 20 Ind. 387.

Where an unrecorded conveyance of real estate is purely voluntary, and the grantor dies insolvent before the delivery of the conveyance to the grantees therein named, we are firmly of the opinion that the doctrine of relation can not be invoked or permitted to give validity to the conveyance, to the prejudice and injury of the administrator and creditors of the deceased grantor.

The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain the demurrer to the cross complaint, and for further proceedings not inconsistent with this opinion.

Filed Nov. 25, 1884. Petition for a rehearing overruled Jan. 28, 1885.

Joab et al. v. Sheets.

No. 11,306.

JOAB ET AL. v. SHEETS.

HABEAS CORPUS.—*Practice.*—Where exceptions are sustained to the return to a writ of *habeas corpus*, and no further return is made, the verified petition for the writ showing facts sufficient, the prisoner may be discharged from restraint without further evidence.

DIVORCE.—*Custody of Children.*—Where, upon granting a divorce, the custody of a child is given to the wife, with directions forbidding its removal from the court's jurisdiction, a disregard of such directions does not *per se* give the father a right to such custody.

From the Superior Court of Vigo County.

I. N. Pierce, C. F. McNutt, J. G. McNutt, S. C. Davis, S. B. Davis, T. W. Harper, S. R. Hammell and M. M. Joab, for appellants.

S. C. Stimson and R. B. Stimson, for appellee.

NIBLACK, J.—This was a proceeding upon a petition for a writ of *habeas corpus*, which was filed in the court below on the 4th day of September, 1883.

The petition, which was supported by the oath of the petitioner, stated that at the March term, 1883, of the superior court of Vigo county, she, under the name of Alice H. Joab, applied for a divorce from her husband Michael M. Joab, and that, on the sixty-second judicial day of said term, that is to say, on the 15th day of May, 1883, a divorce was decreed to her, and the bonds of matrimony theretofore existing between her and the said Michael M. Joab were thereby dissolved; that the custody of Albert Joab, the infant son of the plaintiff, and defendant in that suit, was awarded to the petitioner by the court, and her name was changed from Alice H. Joab to Alice H. Sheets; that the said Michael M. Joab had, since the order and decree concerning the custody of said infant child had been entered, as above stated, unlawfully and with force and violence, taken said infant child, then about two years and eight months old, from the custody of the petitioner and placed him under the care of Columbus Joab and

99	398
128	818

99	328
141	22

99	328
145	582

146	446
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99	328
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148	388
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158	631
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99	328
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165	407
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99	328
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108	358
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108	359
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108	360
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Meda Joab, made co-respondents with him, the said Michael, by all of whom said infant child was restrained of his liberty in the city of Terre Haute, in said county of Vigo.

A writ of *habeas corpus*, directed to the respondents, and appellants here, was issued, and, after bringing the child into court, the respondents moved to quash the writ for the alleged insufficiency of the petition, but their motion was overruled.

They then made return to the writ that the said Michael M. Joab, in whose right the child was detained, was the father of said child; that the decree of divorce, mentioned in the petition, awarded to the petitioner the custody of such child only until the 15th day of December, 1885, after which such custody was to be transferred to the said Michael, as the father of the child; that, in the mean time, the petitioner was prohibited from taking the child out of the jurisdiction of the court without the court's leave; that while the child remained in the custody of the petitioner, the privilege of visiting and taking him out riding or walking, at all reasonable hours, for not more than a half day at a time, was expressly reserved to the said Michael by one of the provisions of the decree of divorce; that afterwards, and while she was in possession of said child under said decree, and in utter disregard of the inhibition imposed by it, the petitioner carried the child out of the jurisdiction of the said superior court of Vigo county, and so detained the same for a period of ten days, without the leave of said court, whereby the said Michael was unlawfully deprived of the privilege of visiting and enjoying the society of his said child for that space of time; that afterwards, on the 16th day of August, 1883, the petitioner, having deliberately planned and arranged to remove the child out of Vigo county, and into the State of Illinois, without leave of court, with the intention of residing in that State with the child for an indefinite time, and with the intention of depriving the said Michael of the privilege of visiting said child without great trouble and inconvenience, proceeded with the child to the Union depot in the morning

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about 7 o'clock, and went on board of a train of cars which was then about to leave for the said State of Illinois; that the said Michael, having a short time previously heard of the petitioner's intention of leaving this State and taking the child with her, went also on board of said train when it was on the point of starting, and without force or violence took said child into his own custody, and has ever since retained the custody thereof in said county of Vigo, taking proper care of such child, and making suitable provision for his comfort and maintenance; that, at that time, the judges of the circuit and superior courts of Vigo county, respectively, were both absent from said county, and neither one of said courts was in session; that the taking and detention of said child by the said Michael, as above stated, was the taking and detention complained of by the petitioner; that, by reason of the premises, the petitioner had forfeited all right to the custody of the child, and that, in consequence, the said Michael, as the father thereof, had become entitled to the care, control and guardianship of the same.

The petitioner excepted to the return, for alleged insufficiency of the facts to constitute a cause for the further detention of the child by the respondents, and the court sustained her exception.

The respondents declining to make further return to the writ, the court, without requiring or hearing any evidence to sustain the allegations of the petition, ordered that the child Albert Joab be discharged from the custody of the respondents and restored to the petitioner. The respondents thereupon immediately prayed an appeal to this court, and, without surrendering the possession of the child, tendered an appeal bond for the approval of the court. The petitioner objected to the approval of the appeal bond, or to the respondents being otherwise permitted to consummate their appeal, until the child was surrendered to her in compliance with the order of the court, but the court overruled the petitioner's objection, and approved the appeal bond.

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The respondents, appealing, have assigned errors upon the record which may be reduced to three specifications:

First. Error in overruling the motion to quash the writ of *habeas corpus*.

Second. Error in sustaining the exception to the return to the writ.

Third. Error in ordering the discharge of the child from the custody of the appellants, without requiring the production of evidence to sustain the allegations of the petition.

The only objection urged to the sufficiency of the petition is, that no copy of the decree of divorce was filed with it. But, while a judgment or decree may be considered and treated as a contract between the parties for some purposes, neither one is a written instrument within the meaning of section 362 of R. S. 1881, and hence no copy need be filed with a complaint based upon, or to enforce, a judgment or decree. *Sears v. Dessar*, 28 Ind. 472; *McSweeney v. Carney*, 72 Ind. 430; *Goble v. Dillon*, 86 Ind. 327 (44 Am. R. 308). We see nothing in this case which ought to take it out of the general rule recognized by the authorities cited, and, for that reason, we assume that the court did not err in overruling the motion to quash the writ of *habeas corpus*.

In support of the second specification of error, it is claimed that the facts stated in the return to the writ showed that the appellee had, by her disregard of the order of court prohibiting her from taking the child out of its jurisdiction, and her planning to still further disregard such order, forfeited her right to the custody of the child; that, at all events, as the appellee was first at fault, she was, and still is, not, on equitable principles, as illustrated by the case of a suit for a specific performance of a contract, in a position to enforce against her late husband, as the defendant in the divorce suit, a strict compliance with the terms of the decree concerning the custody of the child.

In reply to that argument, it may first be said that this was a proceeding to enforce a strictly legal right, and hence one

Joab *et al.* v. Sheets.

to which distinctly equitable principles did not apply. In the next place, the question of the custody of the child was one in which the rights of the child were primarily involved, and where those of his parents were of secondary consideration merely. Church *Habeas Corpus*, section 442 and notes to sections 444 and 446.

The court, as incidental to the proceedings for a divorce, made an order fixing the *status* of the child as between his parents, and prescribing definite directions as to the details of his custody. That order was made presumably for the child's benefit, and was, and still is, one which he is entitled to have executed in all its details. It also became a binding order upon the parties to the divorce suit until modified or set aside, for cause shown, by some subsequent or supplemental proceedings in the same cause. *Williams v. Williams*, 13 Ind. 523; *Baily v. Schrader*, 34 Ind. 260; *Bush v. Bush*, 37 Ind. 164; *Sullivan v. Learned*, 49 Ind. 252; Church *Habeas Corpus*, sections 387, 450.

Lastly, there is a manifest difference between the existence of facts upon which a forfeiture might be declared, and the judicial declaration of a forfeiture upon proceedings instituted for the purpose of obtaining such a declaration. The alleged misconduct of the appellee in having disregarded, and in planning for the further disregard of some of the provisions in the decree of divorce, concerning the custody of the child, might have afforded some reason for the modification of, or some change in, those provisions in a direct proceeding to that end, but it did not of itself work a forfeiture of any of the appellee's rights or responsibilities under the decree. Conceding the truth of the alleged misconduct on her part, it made the appellee simply and only liable to an attachment for a contemptuous disregard of the authority of the court granting the decree of divorce, and to be dealt with as is usual in similar cases of contempt for refusing to comply with orders of court. *DeManneville v. DeManneville*, 10 Vesey Jr. 52; *Whittem v. State*, 36 Ind. 196; *Cook v. Citizens Nat'l Bank*, 73 Ind. 256.

The court did not, therefore, err in sustaining the appellee's exception to the return of the appellants to her petition.

At the hearing in a *habeas corpus* case the court acts summarily upon the facts before it, whether admitted by the pleadings or established by evidence, and even *ex parte* affidavits are sometimes treated as, or received in, evidence in such a case on account of the summary nature of the proceeding. The petition in this case, having been verified by the oath of the appellee, made a sufficiently strong *prima facie* case to entitle her to have a writ of *habeas corpus* issued to the appellants, and to require them to answer as to facts charged by her.

When, therefore, the appellants refused to make further return to the writ, it was the equivalent of an admission, on their part, that all the facts were before the court, and that they were consequently unable to add anything material to what had been already stated by the parties respectively.

Under such circumstances, the court was justified in deciding summarily, and in ordering the discharge of the child from the custody of the appellants, without requiring formal proof to support the allegations of the petition. R. S. 1881, section 1117. Besides, we think it may be safely stated, as a rule of practice in *habeas corpus* cases, that where the respondent failed to deny, or to otherwise controvert the matters charged in the petition, the court may summarily render judgment against him upon the theory that the sworn statements of the petition are in legal effect admitted to be true.

There might be cases arising which would necessarily constitute exceptions to this rule, but none such occur to us at the moment as likely to arise. We must not by this, however, be understood to mean that the court may not, in any case, compel a return to be made to a writ of *habeas corpus*, when necessary to get all the facts before the court, or for the proper administration of justice in any respect.

The appellee has assigned cross error upon the action of the court in approving the appeal bond, and permitting the

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appellants to perfect their appeal, without first surrendering the possession of the child, as ordered by the court.

Whether this cross error would have, in any event, presented any practical or material question for our consideration, we need not now inquire, as the view we have taken of the case in other respects renders such an inquiry unnecessary. We may remark, however, that pending the preliminary examination of the cause, as well as during the hearing, the child was, in legal contemplation, in the custody of the court, and at all times subject to its order from day to day, and that hence the fair inference is that the child was still under the control of the court, though actually in the possession of the appellants at the time the appeal bond was approved. *Hurd Habeas Corpus*, 304, 319; *Garner v. Gordon*, 41 Ind. 92.

The judgment is affirmed, with costs.

Filed Nov. 25, 1884. Petition for a rehearing overruled March 12, 1885.

No. 11,271.

GODDIN v. NEAL.

BANKRUPTCY.—Discharge.—Trust and Trustee.—A judgment on a demand for money had and received, not shown to have been based on a technical or express trust, is barred by a discharge in bankruptcy.

From the Superior Court of Marion County.

H. Dailey, W. N. Pickerill, J. E. McDonald, J. M. Butler
and *A. L. Mason*, for appellant.

J. C. Denny and *I. L. Bloomer*, for appellee.

FRANKLIN, C.—Appellant sued appellee upon a judgment rendered in the court of common pleas in Jefferson county, Kentucky.

The defendant pleaded a subsequent discharge in bankruptcy. The plaintiff replied that the judgment was upon a debt of trust, and not discharged by the bankrupt law. A

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demurrer was overruled to the reply. There was a trial by the court, finding for the defendant, and, over a motion for a new trial, judgment was rendered for the defendant. An appeal was taken to the general term of the superior court, where the judgment of the special term was affirmed, and the cause appealed to this court.

The error assigned here is that the court in general term erred in affirming the judgment of the special term; and the error that was assigned in the special term was, that the court erred in overruling the motion for a new trial. The reasons stated for a new trial were, that the finding of the court was contrary to law, and not supported by sufficient evidence.

There is no question before us in relation to the sufficiency of the pleadings. The objections to the complaint, elaborately discussed by appellee's counsel, as claimed to arise under the overruling of the demurrer to the reply, have not been brought before us by any assignment of cross errors, and can not be considered in this court.

The only questions for us to consider under the assignment of error are as to the sufficiency of the evidence and the legality of the finding.

The only evidence introduced upon the trial was the transcript of the judgment, pleadings and proceedings in the common pleas court of Jefferson county, Kentucky, the subsequent discharge in bankruptcy, and the schedule filed by the defendant in the bankruptcy court of the debts that he asked to be discharged from, which schedule included the plaintiff's judgment.

The judgment shows nothing about its being for a debt of trust, and it is insisted by appellee that in an action upon an ordinary judgment for a debt, the court can not go behind the judgment to inquire into the nature of the indebtedness; that the old debt has been merged into the judgment, and becomes a new one, and must stand or fall in its new character.

Without discussing or deciding this question, we do not think that the facts, as alleged in the complaint upon which

Goddin v. Neal.

the judgment in Kentucky was rendered, make the debt one of trust, such as is exempt from the operation of the bankrupt law. According to the allegations of said complaint, the debt grew out of a collision of two steamboats upon the Mississippi river, owned by the respective parties, in which plaintiff's boat was badly injured, and defendant's boat assisted in saving the cargo of plaintiff's boat.

To adjust all matters between them growing out of the collision, it was agreed that it should be submitted to the Underwriters, at New Orleans, as to how much the defendant should be allowed as salvage for assisting in saving the cargo, and how much the plaintiff should be allowed for the injury to his boat. The parties further agreed that whatever should be allowed the plaintiff for the injury to his boat should be first taken from the amount allowed defendant for assisting in saving the cargo, and the balance allowed defendant should be equally divided between them; that the balance allowed the defendant over and above the claim allowed the plaintiff was \$9,915; that the defendant collected from the Underwriters the whole amount of said balance, and refused to pay the plaintiff any part thereof. Upon the plaintiff's claim for one-half of said balance, the judgment in Kentucky was rendered by default.

The bankruptcy act of 1867, section 5117, R. S. U. S., provides: "No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy."

This statute, in the case of *DuPont v. Beck*, 81 Ind. 271, was held "to be construed as including in the class of 'fiduciary' debts technical trusts only, and not those implied by law from contracts of agency or bailment." See authorities therein referred to. In the claim under consideration we see nothing of the nature of a technical or express trust, or of a "fiduciary" character. The claim for salvage was allowed the defendant in his own name; the Underwriters were not

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parties to the agreement to divide the balance of defendant's claim; after deducting the plaintiff's claim the defendant received such as all rightfully coming to him from such Underwriters; and if he afterwards failed to keep an agreement to pay the plaintiff one-half thereof, it was no more than a breach of any other kind of agreement would be. True, it may be bad faith to violate any kind of agreement, but that is not what is contemplated by the bankruptcy statute.

There is no indication of any bad faith in the bankruptcy proceedings. Plaintiff's judgment was included in defendant's schedule of unsecured creditors, from which he asked to be discharged in bankruptcy. Plaintiff's residence was given therein, and he was doubtless notified of the fact. There was an adjudication thereon, and the defendant was discharged from such indebtedness.

We think the evidence sustained the finding of the court, and that the finding was not contrary to law. There was no error in the superior court in general term in affirming the judgment in special term. The judgment of the general term ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the lower court in general term be and the same is in all things affirmed, with costs.

Filed Oct. 9, 1884.

ON PETITION FOR A REHEARING.

FRANKLIN, C.—Appellant, in his petition for a rehearing, insists that this court erred in the opinion herein, in holding that the evidence did not show that the fund herein sued for was a trust fund, and exempt from the operation of the bankrupt law. The only question presented is as to the sufficiency of the evidence. The only evidence introduced was a transcript of the proceedings and judgment in Kentucky, upon which this suit is brought, and a transcript of the proceedings in the bankruptcy court in Indiana.

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The judgment says nothing about the nature of the fund upon which it was rendered; and whether it was a merger of all previous contracts or not need not be decided, and we decide nothing in relation to that question.

If the appellant is permitted to go behind the judgment and inquire into the nature of the claim sued upon, there is still a failure in the evidence to show it to be a trust fund.

The complaint upon which the Kentucky judgment was rendered by default consisted of two paragraphs. The first a specific one, attempting to set out the facts; the second was a common count for money had and received. The alleged facts in the first are set out in the original opinion, and are therein stated as favorably, if not more favorably to appellant than the averments of the first paragraph warrant; and they still fail to show the claim to be a trust fund as is shown in the original opinion, and is sustained by the authority in the case of *DuPont v. Beck*, 81 Ind. 271.

The same view is taken of this question in the case of *Neal v. Clark*, 95 U. S. 704, and in which the court approved the same construction of the bankruptcy act of 1841 as given in the case of *Chapman v. Forsyth*, 2 How. 202, in which the court says: "If the act embrace such a debt, it will be difficult to limit its application. It must include all debts arising from agencies; and indeed all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country, confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense; a disregard of a trust. But this is not the relation spoken of in the first section of the act."

The foregoing language we think alike applicable to the proper construction of all the bankruptcy laws passed subsequent to that of 1841. But the complaint was composed of the common count as well as the specific paragraph; and this court can not determine whether the judgment was rendered

Lake et al. v. Lake.

upon the common count or the specific paragraph in the complaint, or both. If, upon the common count, there can be no pretence that there was any evidence even tending to show that the claim, upon which the judgment was rendered, was for a trust fund.

The bankruptcy proceedings included this judgment, and the defendant was discharged from all liability therefor. We think the evidence supported the finding of the court, and the petition for a rehearing ought to be overruled.

PER CURIAM.—It is therefore ordered, that the petition for a rehearing be overruled.

Filed Jan. 23, 1885.

No. 11,829.

LAKE ET AL. v. LAKE.

FRAUDULENT CONVEYANCE.—*Assumpsit*.—*Trial*.—*Equity*.—Where a complaint, as in assumpsit, is to recover a sum of money, and also to subject certain lands fraudulently conveyed to the payment of the judgment, the latter branch of the case is not, under section 409, R. S. 1881, triable by jury, and such a trial is fatal error.

ASSIGNMENT OF ERROR.—Where two or more appellants assign error jointly, any error assigned which is good only as to one of the appellants will not be available.

From the Morgan Circuit Court.

G. A. Adams and J. S. Newby, for appellants.

W. R. Harrison and W. E. McCord, for appellee.

BICKNELL, C. C.—The appellee complained of the appellants in two paragraphs. The first paragraph alleges that the defendant Elizabeth Lake, Sr., being indebted to the plaintiff in the sum of \$500, conveyed to her co-defendant George Lake eighty acres of land, without consideration, with intent to defraud the plaintiff and other creditors; that said George Lake received said conveyance with knowledge of said fraudulent intent, and that said Elizabeth Lake, Sr., has no other property out of which said debt can be made.

99	339
132	484
133	426
99	339
135	19
135	364
99	339
146	296

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The second paragraph alleges that said Elizabeth Lake, Sr., on January 1st, 1884, being indebted as aforesaid, conveyed to said George Lake eighty acres of land without other consideration than his agreement for her subsequent support and maintenance; that when said conveyance was made she had no other property subject to execution of which said George Lake had notice.

The complaint demands judgment against said Elizabeth Lake, Sr., for \$500, and that the land be sold to satisfy the debt, and all other proper relief. The defendants answered jointly in four paragraphs, viz.:

1. The general denial.
2. Set-off.
3. Payment.
4. The statute of limitations of six years.

The plaintiff replied in denial. The court awarded a trial by jury, the defendants objecting thereto and excepting, but the parties afterwards agreed to a trial by eight jurors. The jury returned a verdict for the plaintiff for \$125, and with their verdict they returned interrogatories submitted to them by the court, and their answers to the same.

The defendants separately moved for judgment in their favor upon the answers to the interrogatories. These motions were overruled. The defendants separately moved for a *venire de novo*. These motions were overruled. The defendants also moved separately for a new trial and in arrest of judgment, and these motions were overruled.

A personal judgment was rendered on the verdict against the said Elizabeth Lake, Sr., with a decree that the land conveyed as aforesaid be sold to satisfy the judgment. The record states that the defendant George Lake "excepted to the finding and judgment." The defendants appealed. They assign errors jointly as follows:

1. Granting a trial by jury.
2. That the first paragraph of the complaint does not state facts sufficient to constitute a cause of action.

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3. That the second paragraph of the complaint does not state facts sufficient, etc.

4. Error in giving to the jury instructions numbered from 1 to 17, inclusively.

5. Error in overruling the motion of the said Elizabeth Lake, Sr., for judgment in her favor on the answers to the interrogatories.

6. Error in overruling the motion of the defendant George Lake for judgment in his favor on the answers to the interrogatories.

7. Overruling the motion of said Elizabeth for a *venire de novo*.

8. Overruling the motion of said George Lake for a *venire de novo*.

9. Overruling the motion of said Elizabeth for a new trial.

10. Overruling the motion of said George Lake for a new trial.

11. Overruling the motion of said Elizabeth in arrest of judgment.

12. Overruling the motion of said George Lake in arrest of judgment.

13. Rendering a personal judgment against said Elizabeth when the verdict was against both the defendants.

14. Rendering judgment subjecting the lands of George Lake to sale to satisfy the judgment against said Elizabeth.

There was no demurrer to the complaint or either of its paragraphs. The second and third specifications of error, each of which alleges insufficiency of facts as to a single paragraph of the complaint, present no question.

The statute, R. S. 1881, section 343, provides that the sufficiency of the complaint, as a whole, may be questioned for the first time in this court on appeal by a proper assignment of error, but the sufficiency of separate paragraphs of the complaint can not be thus questioned. *Wagner v. Wagner*, 73 Ind. 135; *Higgins v. Kendall*, 73 Ind. 522; *McCallister*

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v. *Mount*, 73 Ind. 559; *Trammel v. Chipman*, 74 Ind. 474; *Schuff v. Ransom*, 79 Ind. 458; *Carr v. State, ex rel.*, 81 Ind. 342; *Haymond v. Saucer*, 84 Ind. 3.

A number of defective assignments can not be combined to constitute a good one, any more than several insufficient paragraphs of a complaint can be deemed to make a good complaint. The assignment of errors is in effect the appellants' complaint in this court, and, like the paragraphs of a complaint, each separate specification must in itself state a sufficient cause for reversing the judgment. *Trammel v. Chipman*, *supra*.

The fourth specification of the assignment of errors is that the court erred in its instructions. This is not an available assignment of error. *Breckenridge v. McAfee*, 54 Ind. 141. All of the remaining specifications of error, except the first, allege errors against one of the defendants. A joint assignment of errors, with specifications against a single defendant, presents no question. *Boyd v. Pfeifer*, 95 Ind. 599; *Owen v. Cooper*, 46 Ind. 524; *Durham v. Craig*, 79 Ind. 117; *Eichbrecht v. Angerman*, 80 Ind. 208; *Towell v. Holweg*, 81 Ind. 154; *Feeney v. Mazelin*, 87 Ind. 226.

The first specification of error is that the court erred in granting the appellee a trial by jury over the objection of the appellants. A part of the relief sought by the complaint was such as prior to June 18th, 1852, could be granted only in a court of equity. Under section 409, R. S. 1881, such causes must be tried by the court.

In *Hendricks v. Frank*, 86 Ind. 278, a judgment was reversed because after the code of 1881 took effect the issues, in a suit formerly of equitable jurisdiction exclusively, were submitted to a jury for trial over the objection and exception of the appellants. In *Evans v. Nealis*, 87 Ind. 262, the court below, in a cause of like equitable jurisdiction, ordered a jury to be empanelled to try the questions of fact in the case, and the jury returned a special verdict. On the return of the verdict, the court made its own finding, embracing some

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of the findings of the jury, and also stating additional facts, upon which, and upon the information furnished by the special verdict, the court rendered its judgment. This was held to be substantially in accordance with section 409, *supra*. In *Lake Erie, etc., R. W. Co. v. Griffin*, 92 Ind. 487, it was held error to submit such an equitable cause to a jury for trial as an action at law. In the case at bar the court below, over the objection of the appellants, submitted the issues for trial to a jury as in an action at law, and rendered judgment on the verdict of the jury. For this error the judgment must be reversed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things reversed, at the costs of the appellee, and this cause is remanded for a new trial.

Filed Jan. 9, 1885. Petition for a rehearing overruled March 12, 1885.

No. 11,993.

WINGO v. THE STATE.

CRIMINAL LAW.—*Appeal*.—The statute gives an appeal only from a final judgment; and the agreement of a prosecuting attorney can not confer the right to appeal from an interlocutory judgment against the defendant upon demurrer to a plea.

From the Vigo Circuit Court.

W. E. McLean, for appellant.

F. T. Hord, Attorney General, and W. B. Hord, for the State.

ELLIOTT, J.—The appellant was tried upon a charge of larceny and acquitted. This judgment was sustained by this court upon the ground that he could not be guilty of the offence of larceny under the statute, because the offence charged constituted embezzlement. *State v. Wingo*, 89 Ind. 204. The court below, upon his acquittal, directed that he be taken into

99	343
130	546
99	343
142	324
99	343
148	181

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custody on the latter charge. To the indictment charging the crime of embezzlement the appellant pleaded in bar the former judgment acquitting him of larceny, and to this plea the demurrer of the State was sustained, but no final judgment was rendered. The prosecuting attorney signed an agreement stipulating that the appellant should have the right of appeal, but the attorney general here contends that we can not entertain the appeal, because there was no final judgment.

Waiving the question of the authority of the prosecuting attorney to bind the State by such an agreement, we declare that it is without force, for the reason that consent can not confer jurisdiction of the subject-matter of a legal controversy. It is a familiar principle that consent can not invest courts with jurisdiction of the subject-matter, although it may give jurisdiction of the person. *Doctor v. Hartman*, 74 Ind. 221.

We must, therefore, disregard this agreement, and ascertain whether the law gives jurisdiction in a criminal case where there is no final judgment. The statute provides that appeals may be taken "in the manner and in the cases prescribed herein," and that "All appeals must be taken within one year after the judgment is rendered." In another place it is provided that an appeal does not stay execution. R. S. 1881, sections 1881, 1885, 1888. These provisions evidently contemplate appeals from final judgments, and do not allow appeals from rulings made upon pleadings, or made during the trial. Our decisions have uniformly declared that it is only from final judgments that appeals will lie. In the case of *Miller v. State*, 8 Ind. 325, upon which appellant relies, it was held that "A cause which has not progressed to final judgment, is not appealable to this court." The court, in *Farrd v. State*, 7 Ind. 345, said, that "The 148th section is general, allowing the appeal, as a matter of right, where judgment is given against the defendant. This has reference to a final judgment, as the subsequent sections, particularly the 161st, plainly show." A similar ruling was made in *Reese v. State*,

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8 Ind. 416, *Woolley v. State*, 8 Ind. 377, *Pigg v. State*, 9 Ind. 363, *State v. Ely*, 11 Ind. 313, *State v. Spencer*, 92 Ind. 115.

We have no jurisdiction of this appeal, and will not consider any of the questions presented by the ruling on the demurrer to the appellant's plea. Appeal dismissed.

Filed Jan. 6, 1885.

No. 11,213.

OPP V. TENEYCK ET AL.

99 345
125 214

APPEAL BOND.—*Liability of Obligors.*—*Rent of Land Pending Appeal in Action for Possession.*—*Statute Construed.*—The obligors upon an appeal bond, given by a judgment defendant on appeal to the Supreme Court from a judgment for the possession of real estate, are liable for the amount of the money judgment, and for the rental value of the real estate pending the appeal, under section 44, chapter 37, R. S. 1843, which was continued in force by section 802 of the code of 1852.

SAME.—They are thus liable under section 790, code of 1852 (section 1221, R. S. 1881), although there may be no stipulation in the bond, that the obligors shall be liable for the mesne rents. *Epstein v. Greer*, 85 Ind. 372, criticised.

From the Superior Court of Tippecanoe County.

B. W. Langdon, J. R. Coffroth and T. A. Stuart, for appellant.

F. B. Everett, M. Jones, J. S. Miller and W. F. Severson, for appellees.

ZOLLARS, J.—In April, 1880, appellee TenEyck recovered a judgment against Francis L. Bittings and others for the possession of real estate, and for \$566.66 for the detention thereof.

During term time an appeal was prayed to this court from that judgment, and an appeal bond, fixed and approved by the court, was filed. The judgment was affirmed by this court, and in March, 1883, appellee TenEyck was put into the possession of the real estate. This action is upon the appeal bond executed by Francis L. Bittings as principal, and appellant Opp as surety. Judgment was rendered against

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these obligors in the court below, in favor of TenEyck, not only for the amount of the money judgment in the action for the possession of the real estate, but also for the rental value of the real estate from the rendition of that judgment until the possession was restored to him. Whether or not, under the bond and the law, the obligors are liable for the rents pending the appeal, is the controlling question presented by the record.

The appeal bond, after reciting the judgment appealed from, closes with the following: "Now, if the said defendants will duly prosecute their appeal, and abide by and pay the judgment and costs which may be rendered or affirmed against them, then this obligation shall be void, otherwise in full force."

It is very apparent that if the obligors are liable for the rents, it is not by virtue of anything expressed in the bond. Unless there was some statute in force when the bond was executed, fixing such liability, the court below was in error in charging the obligors with the rents.

Section 555 of the code of 1852, 2 R. S. 1876, p. 240, provided: "When an appeal is taken during the term at which the judgment is rendered, it shall operate as a stay of all further proceedings on the judgment, upon an appeal bond being filed by the appellant, payable to the appellee, with condition that he will duly prosecute his appeal, and abide by and pay the judgment and costs which may be rendered, or affirmed against him, with such penalty and surety as the court shall approve," etc. This section provided, in broad terms, that the appeal and bond should stay all proceedings in the way of enforcing the judgment, pending the appeal, but contained no provision to secure the appellee against the loss of rents pending the appeal, in a case like this. That all proceedings, in the way of enforcing a judgment for the possession of real estate, should be stayed by the filing of a bond that would not protect the judgment plaintiff against the loss of rents pending the appeal, would seem to be a hardship. Evidently, here is an omission, such as was meant to be provided for by section 802 of the code of 1852. 2 R. S. 1876,

p. 314. That section provides as follows: "The laws and usages of this State relative to pleadings and practice in civil actions and proceedings, not inconsistent herewith," (the code) "and as far as the same may operate in aid hereof, or to supply any omitted case, are hereby continued in force." We think that, by this section, section 44 of chapter 37, R. S. 1843, p. 633, was continued in force. That section is as follows: "When any appeal is taken to the Supreme Court from a judgment in waste, or for the recovery of land, or the possession thereof, the condition of the appeal bond, in addition to the matters hereinbefore prescribed, shall further provide, that the appellant shall also pay and satisfy all damages which may be sustained by the appellee for the mesne profits of the premises recovered, or for any waste committed thereon, as well before as during the pendency of such appeal." This section is in no way in conflict with section 555 of the code of 1852, *supra*, but, on the contrary, operates in aid thereof, by supplying an omission. With this section in force in aid of section 555, *supra*, the judgment defendant might have the benefit of an appeal, be left in possession of the premises pending the appeal, and the judgment plaintiff be secured against loss by reason of being kept out of possession during such appeal. Prior to this case, it has not been held, directly, that the above section 44 was continued in force by section 802, *supra*, but there have been a number of decisions as to the scope and effect of this latter section. See *Belton v. Smith*, 45 Ind. 291; *Stockton v. Coleman*, 42 Ind. 281; *Chidester v. Chidester*, 42 Ind. 469; *Walker v. State*, 23 Ind. 61; *Patterson v. Crawford*, 12 Ind. 241; *Forsythe v. Park*, 16 Ind. 247; *Wright v. State*, 5 Ind. 290. In the case of *Jones v. Droneberger*, 23 Ind. 74, it was held that the obligors upon an appeal bond were liable for the rents pending the appeal, by virtue of the statute, but under what statute was not stated.

The question yet remains as to whether or not the obligors can be held liable for the mesne rents, there being no provision of that kind in the bond. Section 790 of the code of

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1852 was as follows: "No official bond entered into by any officer, nor any bond, recognizance or written undertaking taken by any officer in the discharge of the duties of his office, shall be void for want of form, or substance, or recital, or condition, nor the principal or surety be discharged; but the principal and surety shall be bound by such bond, recognizance or written undertaking, to the full extent contemplated by the law requiring the same, and the sureties to the amount specified in the bond or recognizance. In all actions on a defective bond, recognizance or written undertaking, the plaintiff or relator may suggest the defect in his complaint, and recover to the same extent as if such bond, recognizance or written undertaking were perfect in all respects." 2 R. S. 1876, p. 311. See same section, 1221, R. S. 1881. The force and effect of this section is to cure defects and supply omissions in the class of bonds named, whether the defects and omissions be of form or substance, and to hold the obligors, both principals and sureties, to the full extent of the law requiring the bond. This is the plain interpretation of the section, and so it has been often ruled. See *Moore v. Jackson*, 35 Ind. 360; *Ward v. Buell*, 18 Ind. 104; *Boden v. Dill*, 58 Ind. 273; *Fuller v. Wright*, 59 Ind. 333; *Black v. State, ex rel.*, 58 Ind. 589; *Hudelson v. Armstrong*, 70 Ind. 99; *Corey v. Lugar*, 62 Ind. 60; *Cook v. State, ex rel.*, 13 Ind. 154; *Gavisk v. McKeever*, 37 Ind. 484; *Bugle v. Myers*, 59 Ind. 73; *Dunn v. Crocker*, 22 Ind. 324.

In this connection we are cited to the case of *Malone v. McClain*, 3 Ind. 532, in which it seems to have been held that the obligors were not liable for the mesne rents, because the bond did not so provide. This case was distinguished in the case of *Jones v. Droneberger, supra*, and seems to be in conflict with many subsequent cases. It is apparent that the case was decided without reference to section 485, R. S. 1843, p. 760, which was very much the same as section 790 of the code of 1852. We adhere to the later cases. In the case before us, a copy of the bond was filed with the complaint as a part

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of it. This, with the several averments of the complaint, sufficiently suggested the defects in the bond to authorize a recovery upon it, as if it had contained an undertaking to pay the mesne rents, and had otherwise been perfect in all respects. See the cases last above cited.

Our conclusion is that the obligors are liable under the bond for the rents pending the appeal in which the bond was given, and that there is, therefore, no error in the record. It may be noted in passing, that the code of 1881 has a provision similar to section 44, in the revision of 1843.

The judgment is affirmed, with costs.

Filed Nov. 13, 1884.

ON PETITION FOR A REHEARING.

ZOLLARS, C. J.—That the liability of a surety is *strictissimi juris*, and not to be extended by construction, and that *ita lex scripta est* must control in deciding what the statute law is, are propositions well settled, and were not overlooked in the decision of the case. Nevertheless, when there is a contention as to the proper construction of a statute, it is always proper to consider what rights were intended to be secured, or what evils were intended to be provided against, by the legislation. Nor was the general rule overlooked, that where a new law covers the whole subject-matter of the former, is inconsistent with it, and evidently intended to supersede and take the place of it, it repeals the old law by implication. To hold that the surety in appeal bonds is bound to the full extent of the law requiring the bond, is not to extend his liability, because the law expressly declares that he shall be thus bound; and where he executes such a bond, he is bound to know, and must be held to have known, that his liability will not be measured alone by a defective bond, but also by the law requiring the bond. And then too, the bond in question here was executed when the decision of this court, in the case of *Jones v. Droneberger*, 23 Ind. 74, holding that the obligors upon an appeal bond in such a case as

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this, are liable for the rents, pending the appeal, was unchallenged. The main argument by counsel for appellant is that section 44, chapter 37, R. S. 1843, was not in force: First. Because it was not set out and re-enacted in the revision of 1852; and, Second, because the section does not relate to pleading and practice, and hence was not continued in force by section 802 of the code of 1852. If it were not for this section, the first position would be well taken: That the legislators were impressed with the thought that something necessary might have been omitted from the code of 1852, is very patent from the above section 802. The purpose of that section, as therein declared, was not to repeal, but to continue in force, all laws and usages of the State relative to pleading and practice in civil actions and proceedings, not inconsistent with the code, and that might operate in aid thereof, or supply any omitted case.

The case, therefore, turns upon the proper interpretation and scope of that section. The first duty in the interpretation of a statute is to ascertain the meaning and intention of the Legislature, and this must be done, in the first instance, from the language used. What, then, did the Legislature intend by continuing in force the laws and usages of the State relative to "pleading and practice" in civil actions? What was intended by the terms "pleading and practice" as used in the above section? As there used, are these terms broad enough to include, and were they intended to include, appeal bonds on appeal to this court? It seems to us that there can not be much question as to what was intended to be embraced within these terms, because the whole act shows in what sense they were used by the law-makers. The heading of the chapter and title of the act are as follows:

"PART SECOND.

"Concerning the Civil Procedure of Courts, and their Jurisdiction in Civil Matters.

"CHAPTER 1. An act to revise, simplify and abridge the rules, practice, pleadings and forms in civil cases in the courts

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of this State—to abolish distinct forms of action at law, and to provide for the administration of justice in a uniform mode of pleading and practice, without distinction between law and equity.” 2 R. S. 1852, p. 27; 2 R. S. 1876, p. 32.

In this act, thus entitled, and following the above heading, and nowhere else, we find the provisions providing for appeal bonds to this court, and other like bonds connected with the practice, and providing for the form and substance of such bonds, and the liability of the obligors upon such bonds. The fact that the legislators thus provided for the bonds in the practice act shows conclusively that they regarded them as relating to the practice and procedure in civil actions; in other words, regarded the laws requiring such bonds, and fixing the liability upon them, as laws relating to the practice in civil actions. In confirmation of this view is the further consideration, that section 44 of the revision of 1843 is found in the act entitled an act “concerning * * proceedings in civil cases.” R. S. 1843, p. 622.

In the construction of section 802, *supra*, the courts should adhere to the meaning of the term “practice,” given to it by the Legislature. And, as it seems to us, it is not a strain of language to say that the law requiring such bonds, and fixing the liability upon them, is a law relating to the procedure and practice in civil actions. B. is upon A.’s land. A. wishes to eject him from it. The law provides a course of practice and procedure to accomplish this end; as a part of that, is the provision that B. may appeal to this court, and if he gives a bond he shall not be ejected until this court shall have passed upon the case. This bond is just as much a part of the practice and procedure as is a bond in an injunction, or any other proceeding requiring a bond.

It may well be said here, as was said by the English court in the case of *Poyser v. Minors*, L. R., 7 Q. B. Div. 329, 333, that “‘Practice’ in its larger sense—the sense in which it was obviously used in that act, * * denotes the mode of proceeding by which a legal right is enforced.”

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Our attention is called to the case of *Epstein v. Greer*, 85 Ind. 372, in which the commissioner cites with approval the case of *Malone v. McClain*, 3 Ind. 532, in which it was held that there could be no recovery beyond the letter of the bond. In the first place, the case in 85 Ind., *supra*, might have been decided, as it was decided, without approving the case of *Malone v. McClain*, *supra*. What the commissioner said, therefore, in the way of approving of the doctrine of that case, may well be regarded as *dictum*. As shown by the citations in the principal opinion, this court has long since departed from the doctrine of the case of *Malone v. McClain*, *supra*, upon the point in support of which the commissioner cited it. What was said in commendation of it, therefore, in the case of *Epstein v. Greer*, *supra*, must be and is disapproved.

After a careful review of our holding in the principal opinion, and a careful reading of appellant's argument upon the petition for a rehearing, we are satisfied that the case was decided correctly; and that the petition for a rehearing should be overruled.

In addition to the cases cited in the principal opinion showing the scope that has been given to section 802, *supra*, we cite *Hudelson v. Armstrong*, 70 Ind. 99.

The petition for a rehearing is overruled.

Filed March 12, 1885.

No. 11,118.

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TAXES.—*Complaint to Set Aside Sale of Land.*—A complaint to set aside a sale of land for taxes legally assessed, on the ground that the land was sold without being advertised, and while the owner had sufficient personal property with which to pay the taxes, is insufficient upon demurrer unless it is also averred that the plaintiff has paid the taxes or offers to pay them.

SAME.—This rule applies in controversies between the land-owner and the purchaser.

SAME.—*Priority of Liens.*—*Mortgage.*—*Purchaser at Foreclosure Sale.*—*Taxes*

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assessed against the owner of the equity of redemption become a lien upon the land superior to the lien of a prior mortgage given for purchase-money, and where such mortgage is foreclosed, and the land purchased under such decree, by the mortgagee, he takes it charged with such taxes.

SAME.—Assessment in Another than Owner's Name.—The assessment of taxes upon the owner's land in another's name does not impair the assessment.

SAME.—Personal Property.—The assessment of taxes for personal property becomes a lien upon the land of the owner in the county.

SAME.—Misdescription of Land.—Lien.—A misdescription of land assessed does not destroy the lien of the State for taxes, and a sale of such land for taxes by such misdescription will transfer the lien of the State to the purchaser.

SAME.—Private Sale.—A private sale of land for taxes, after notice as required by the statute, will transfer the lien of the State to the purchaser.

SAME.—Statute Construed.—A purchaser of land for taxes under the act of December 21st, 1872, where the title proves invalid, is only entitled to a lien for the purchase-money, and all subsequent taxes paid by him, at the rate of twenty per centum, under the 3d and 4th sections of the act of March 5th, 1883, which govern such cases.

From the Superior Court of Tippecanoe County.

H. W. Chase, F. S. Chase, F. W. Chase, J. S. Frazer and W. D. Frazer, for appellant.

J. C. Blacklidge, W. E. Blacklidge, and B. C. H. Moon, for appellee.

BEST, C.—The appellant brought this action to set aside a sale of his land for taxes and to quiet his title.

The complaint consisted of two paragraphs. A demurrer was sustained to the first and overruled to the second. An answer in denial was filed, and also a counter-claim, whereby the appellee sought to quiet his title. The latter was denied, and an agreement was made that any relief might be granted under the issues thus formed that would be proper under any state of pleading.

The cause was submitted to the court for trial, with the request that the court find the facts specifically and state its conclusions of law thereon. This was done. Both parties excepted to the conclusions of law, and judgment was rendered, setting aside the sale and adjudging a lien upon the

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land in favor of the appellee for the amount of taxes paid, with eight per cent. interest thereon.

The appellant insists that the court erred in sustaining the demurrer to the first paragraph of the complaint, and in concluding upon the facts found that the appellee was entitled to a lien upon the land for the amount of taxes paid by him. The appellee, by a cross assignment of errors, insists that the court erred in overruling the demurrer to the second paragraph of the complaint, and in concluding upon the facts found that he was not entitled to interest at the rate of twenty-five per centum. These questions will be considered in their natural order.

The second paragraph of the complaint alleged, in substance, that the appellant owned the land in question, and on September 30th, 1873, sold and conveyed it to John Hirzel, who, to secure the unpaid purchase-money, executed to him a mortgage upon said land for \$8,000, one-half of which was payable in one and the other half in two years from that time, with interest at ten per cent.; that said John Hirzel failed to pay said mortgage; the same was thereafter duly foreclosed, an order of sale issued, and said land sold to the appellant on the 27th day of March, 1880; that the same was not redeemed, and at the expiration of a year from the sale the same was conveyed to the appellant, whereby he became re-invested with the title; that on the 18th day of February, 1880, the appellee purchased said land from the auditor of said county at private sale, for the taxes "alleged to have been assessed against the same as the property of said Hirzel, for the year 1878 and previous years;" that said taxes are alleged to have become delinquent to the amount of \$223.04, and that the appellee paid the same to the treasurer of said county and received a certificate of purchase; that on the 24th day of February, 1882, the auditor of said county executed a deed for said land to the appellee, and by virtue thereof he now claims said land; that said sum of \$223.04 "was not, nor was any part thereof, assessed or placed upon the tax-duplicate

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which came to the hands of the treasurer of said county for any of the years of 1875, 1876, 1877, 1878 and 1879 against said land;" that notice of said sale was never published by said auditor. Wherefore, etc.

This paragraph was, as it seems to us, radically defective, because it fails to show that these taxes were paid or tender of payment made before suit brought, or that these taxes were not a lien upon the land.

This is an application to a court of equity to remove a cloud from the appellant's title, and it is well settled that so long as any of the taxes legally due remain unpaid, such court will not aid a party unless he offers to pay the taxes due. *Harrison v. Haas*, 25 Ind. 281; *McWhinney v. Brinker*, 64 Ind. 360.

Our statutes do not change this rule. They authorize the holder of a tax title to bring an action to recover possession or to quiet his title, and they provide that if his title fail for certain causes, the court shall ascertain the amount of taxes paid, the improvements made, if any, and shall decree the amount a lien upon the land. The third section of the act of March 5th, 1883, is the only one that seems to authorize it. This section provides that "in case judgment shall be rendered against the person holding the title from the auditor aforesaid for the recovery of such land in an action of ejectment or other action, either at law or equity, the court shall ascertain the amount due to the person holding such tax deed," etc., "adding thereto the value of all improvements," etc., "and shall decree the payment thereof within such reasonable time," and on default thereof shall order the land sold. This section manifestly contemplates an action for the recovery of the land and none other. The phrase "or other action, either at law or equity," means nothing, as there is no other action by which land can be recovered, and the action of ejectment is at law. To maintain such action it is not necessary to "do equity." If the party has the legal title and is entitled to possession, he may maintain the action

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though the opposite party is entitled to a lien. If, however, he can not at law successfully assail his adversary's title, and goes to a court of equity to set it aside, he must first do equity himself by paying or offering to pay what is due, and this statute does not enable him to do otherwise.

This land was liable for taxes, and assuming for the present that it was liable for the taxes assessed against John Hirzel, we think it does not appear that it was not liable for the taxes for which it was sold. The averment is that it was sold "for taxes assessed against John Hirzel for the year 1878, and for previous years," and that the sum of these taxes was not assessed or placed upon the duplicate for the years 1875, '6, '7, '8 and '9. The fact that they were not placed upon the duplicate, and this is all that is averred, in no manner affected their validity or released the land from its share of the common burden. Again, for aught that is averred, the taxes for 1874 may have been legally assessed and properly placed upon the duplicate, and no reason is assigned why this portion of the tax is not legally due and does not constitute a lien upon the land. If this portion is due, and payment or tender of payment has not been made, this action can not be maintained.

This much has been said upon the assumption that this land is liable for the taxes assessed against John Hirzel. This the appellant disputes. He maintains that as these taxes were assessed against Hirzel during the time this land was encumbered by appellant's mortgage, they only bound the equity of redemption, and inasmuch as this has been extinguished by the foreclosure of the mortgage and the sale of the property, no interest of Hirzel remains upon which they can attach, and hence they do not now constitute a lien upon the land. This precise proposition was decided adversely to the appellant in the cases of *Bodertha v. Spencer*, 40 Ind. 353, and *Isaacs v. Decker*, 41 Ind. 410. In each of these cases it was held that taxes thus assessed continue a lien upon the land after a foreclosure and sale upon a prior

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mortgage, as against the mortgagee who becomes the purchaser. These cases, of course, are decisive of this question.

As this land was liable for the taxes thus assessed against John Hirzel, and as this paragraph did not aver payment or tender of payment, it was insufficient, and the demurrer improperly overruled.

The first paragraph of the complaint was defective for the same reason, and the demurrer thereto was, therefore, properly sustained.

The conclusion thus reached would seem to render it unnecessary to consider the questions raised by the exceptions to the conclusions of law, but as these questions will necessarily hereafter arise, we will now pass upon them.

A condensed statement of the facts as furnished by the appellant, and the conclusions of law, are in these words:

"July 28, 1832, said school section was subdivided by the proper officers, platted, and the plat recorded in the recorder's office, as follows:

NORTH				
WEST	Lot 4. 40.96 acres	Lot 3. 40.87 acres	Lot 2. 39.98 acres	Lot 1. 38.96 acres
	Lot 5. 39.96 acres	Lot 6. 40 acres	Lot 7. 39.93 acres	Lot 8. 39.88 acres
	Lot 12. 39.91 acres	Lot 11. 40.45 acres	Lot 10. 39.58 acres	Lot 9. 39.60 acres
	Lot 13. 39.51 acres	Lot 14. 40.02 acres	Lot 15. 40.03 acres	Lot 16. 40.06 acres
SOUTH				
EAST				

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"September 16th, 1873, the appellant, being the owner of the northwest quarter of the southwest quarter of said section 16, which corresponds to lot twelve in said subdivision and recorded plat, by purchase of one White, executor of Edward C. Herrick, sold it to John Hirzel for \$1,200, of which \$400 was cash, and \$800 evidenced by two notes of \$400 each, at one and two years, at 10 per cent. interest, both of which were secured by a mortgage from Hirzel, who took immediate possession and kept it till May 5th, 1878. He had no other land, but his wife owned a tract adjoining on which they lived. Hirzel cut 200 cords of wood on the land, which he removed and sold. He had, during all the time he occupied the land, from \$300 to \$400 worth of personal property on it and the tract adjoining. The appellant recorded his mortgage immediately. The land was assessed to Herrick for 1874, and to the appellant for 1875, by the description of 'lot numbered 12, in section 16, township 23, range 5,' but for the years 1876, '7, '8 and '9 it was not assessed to any one, so far as the records in the auditor's office and treasurer's office of the county show; but they do show the assessment of lot number *two*, in said section 16, for those years to John Hirzel.

The taxes on lot 12 for 1874 were	\$ 16.11
For 1875, including the delinquent tax	20.75
For 1876, taxes for said lot <i>two</i> , in said section 16 .	73.55
For 1877, taxes for said lot <i>two</i> , including delinquencies,	97.62
For 1878, " " " <i>two</i> , " " "	123.31

And the aggregate of the delinquent chattel tax on chattels owned by John Hirzel up to and including 1879, was 82.85

"Said John Hirzel did not pay any taxes on any land in said section 16 for the years 1874, '5, '6, '7, '8 and '9, or any of them; nor did the appellant pay any such taxes, but he did pay the taxes on said lot 12 for 1873.

"The northwest quarter of the northeast quarter of section 16, which corresponds to lot No. *two* upon said plat, made in 1832, was assessed from 1872 to 1879 to the actual owners

thereof by the description of lot 2, section 16, etc., and the taxes paid by such owners, ' while lot 12 was not on the duplicate, lot 2 was doubly assessed, and to the assessment of lot 2, in the name of John Hirzel in 1876, was carried the delinquency of 1875 against lot 12, and so continued from year to year against this record description of lot 2.'

"Said John Hirzel having failed to pay his notes, said mortgage was foreclosed by the appellant, who obtained a judgment February 14th, 1880, for \$1,203.30 and costs—the appellee not being a party—under which said northwest quarter of southwest quarter of section 16, etc., was sold by the sheriff to the appellant for \$900 March 27th, 1880, and a sheriff's deed was made to him therefor April 30th, 1881, which was rendered May 16th, 1881.

"Said section 16 has been, since its subdivision in 1832, situate in Wabash township, in said Tippecanoe county, and said John Hirzel never owned any land in that township, except said northwest quarter of the southwest quarter of section 16.

"There was the following, and no other entry and assessment of property on the tax-duplicate of Tippecanoe county for the year 1879, which came to the hands of the treasurer thereof in due form in the month of December, 1879, to wit: John Hirzel, 39.91 acres, part lot No. 2, section 16,

township 23, range 5, value of land and improvements	\$ 16.20
Taxes, charges and interest	139.84
Chattels	82.85'

"The auditor caused notice of the sale of lands delinquent for taxes to be advertised, to take place at the court-house door on the second Monday of February, 1880, by four publications in the Lafayette Journal newspaper for four weeks, the last being January 30th, 1880, and in no other way, and there was no land situate in said section 16, township 23, range 5, advertised for sale in said February, 1880, for taxes, except that described as follows:

"John Hirzel, 39.91 acres, pt. lot No. 2, sec. 16, T. 23, R. 5."

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"This land, by that description, was offered at public sale for the taxes, then amounting, with penalties, interest, costs, and the \$82.85 chattel-tax against said John Hirzel, to \$223.04, and no one bidding for it, the same was, February 12th, 1880, declared forfeited to the State, and February 18th, 1880, the treasurer and auditor of the county sold, for \$223.04, 'at private sale to said Millikan, 39.91 acres, being part of lot No. 2, in section 16, township 23 north, range 5 west,' returned 'delinquent,' etc., for the taxes, costs and charges for the year 1878 and 'previous years,' and a certificate of purchase was issued to the appellant accordingly.

"Millikan paid \$12.86 taxes on the land January 10th, 1882, and February 24th, 1882, a tax deed was made to him by the auditor for lands described thus: '39.91 acres, being part of lot No. 2 in section 16, township 23 north, range 5 west, and being more particularly described upon information furnished by the county surveyor as follows: The northwest quarter of the southwest quarter of school section 16, township 23 north, range 5 west, and being lot No. 12 in said school section.' This deed was duly recorded, and under it the said Millikan asserted title to lot No. 12, otherwise described as the northwest quarter of the southwest quarter of section 16, etc. He paid \$2.85 for making and recording the deed.

"Upon these facts the court found as

"CONCLUSIONS OF LAW,

"*First.* That the title to the northwest quarter of the southwest quarter of section 16, etc., was in said Peckham.

"*Second.* That said Millikan had no title to said land, but had a lien thereon for \$223.04, with 8 per cent. interest from February 18th, 1880, and for \$12.86, with 8 per cent. interest from January 10th, 1882, and for \$2.85 for cost of certificate, deed and recording, in all \$298.30.

"*Third.* That Millikan was entitled to a judgment against said real estate for \$298.30, with 6 per cent. interest from the date of finding, and unless the same should be paid within

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sixty days said real estate should be sold to pay it without the benefit of appraisement or redemption.

"*Fourth.* That said Peckham was entitled to judgment setting aside the tax deed for said land."

The appellant maintains that the facts found do not entitle the appellee to a lien upon the land for the amount of taxes paid. This position is based upon two grounds. The first is that these taxes were assessed to John Hirzel, a mortgagor, whose equity of redemption has been foreclosed, and, in consequence thereof, the lien that then attached has been divested. This position is untenable, as has already been shown in passing upon the demurrer to the second paragraph of the complaint.

The next ground is that the facts show that the land never was assessed for these taxes, and by reason thereof the State acquired no lien, and hence none could be transferred to the appellee by the payment of the taxes. The facts found do not support this assumption. This land was assessed for the years 1874 and 1875. The first assessment was made in the name of the former owner, and the next in the name of the appellant. This fact, however, does not impair or affect the validity of these assessments. *Cooper v. Jackson*, 71 Ind. 244; *Mesker v. Koch*, 76 Ind. 68. The assessment for personal property was also a lien upon this land, as has several times been decided. *Bodertha v. Spencer*, 40 Ind. 353; *Isaacs v. Decker*, 41 Ind. 410; *Rinard v. Nordyke*, 76 Ind. 130.

It, therefore, appears that the State did have a lien upon such land for at least some of these taxes, and as the appellee paid them by purchasing the property at a tax sale, and as his title has failed, the lien thus held has been transferred to him, and he is entitled to enforce it against the land. *Ward v. Montgomery*, 57 Ind. 276; *Crecelius v. Mann*, 84 Ind. 147.

The most, therefore, that can be claimed, is that the lien declared was for more taxes than were legally due. Is this true? This position rests upon the assumption that the assessments of 1876, 1877, 1878 and 1879, were made upon a

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different parcel of land. If not thus made, this view can not be maintained. These assessments describe the land as lot 2, and the appellant insists that this shows that a different parcel was assessed; while the appellee insists that lot 12 was in fact assessed, but misdescribed. The facts found show that lot 2 was owned by and assessed to other parties, and that such taxes were regularly paid. They further show that John Hirzel owned lot 12 and no other land, and that taxes on land was assessed to him. It is highly improbable that the officers either intended or actually did assess lot 2 twice, or that they omitted to assess lot 12 once. If they did not assess lot 2 twice, the land assessed to John Hirzel was misdescribed, and as he had no land other than lot 12 it must be that the assessments upon his land were made upon that lot. In view of these facts it seems morally certain that this land was in fact assessed, though misdescribed, and we, therefore, think that these assessments constituted liens upon this land.

The next question is whether the court erred in not allowing the appellee interest at the rate of twenty-five per centum. This sale was made while the act of December 21st, 1872, was in force, and it has been repeatedly held that where a sale is made under such act, and the conveyance is ineffectual to convey title, because of the facts found, the purchaser is entitled to interest upon the taxes paid at the rate of twenty-five per centum. *Flinn v. Parsons*, 60 Ind. 573; *Duke v. Brown*, 65 Ind. 25; *Hosbrook v. Schooley*, 74 Ind. 51.

The act of December 21st, 1872, was repealed before the judgment in this case was rendered, but this in no manner affects the question as the law now and then in force authorizes the same rate of interest. The fourth section of the act of March 5th, 1883, provides that if the title of such purchaser fails, he "shall recover the amount of taxes due on the land, with interest at the rate per centum per annum allowed by the law * * in force at the date of such sale." This statute entitles the appellee to the rate of interest allowed by

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the act of December 21st, 1872, under which the sale was made, and this was, as has been shown, twenty-five per centum. This applies to the amount paid upon the purchase, and as to taxes subsequently paid the rate is determined by the law in force when the payments were made. We, therefore, think that the court erred in concluding that the appellee was only entitled to eight per cent. interest upon any of the taxes paid.

This disposes of all the questions in the record, and for the reasons given the judgment must be reversed. If, however, the appellee is content to take a judgment for the taxes paid, with interest as above indicated, conclusions of law should be so stated, and judgment rendered accordingly; otherwise the demurrer should be sustained to the second paragraph of the complaint.

PER CURIAM.—It is therefore ordered that the above judgment be and it is hereby reversed, at the appellant's costs, with instructions to state conclusions of law and render judgment thereon if the appellee is contented therewith; otherwise to sustain the demurrer to the second paragraph of the complaint.

Filed Feb. 16, 1884.

ON PETITION FOR A REHEARING.

BEST, C.—This petition has been earnestly pressed, and we have again carefully examined all the questions involved in this case. The first paragraph of the complaint concedes the legal assessment of the taxes for which the land was sold, and, in support of the relief sought, alleges that the sale was made without notice, and while the owner had sufficient personal property with which to pay his taxes. It is insisted that a sale made under these circumstances is not only void, but that the lien of the State is not transferred, and that a court of equity will set aside such sale without requiring the owner to pay the taxes legally due from him. The omission to advertise the land for sale, or the failure to first exhaust the owner's

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personal property, will certainly defeat the purchaser's title. This has often been decided, and is thoroughly settled. It does not, however, follow that a court of equity will set aside such sale unless the owner will pay the taxes legally due. This duty rests upon him, and the fact that his taxes have been paid by a purchaser at an illegal sale in no manner exonerates him from such duty. After the sale the duty continues, and so long as it remains undischarged a court of equity will not disturb the sale. This rule, the appellant concedes, obtains in a controversy between the State and the land-owner, but insists that it does not apply to a controversy between the land-owner and a purchaser. No authority is cited in support of this distinction, and we know of none; on the contrary, this rule has several times been applied by this court in controversies between land-owners and purchasers. *Harrison v. Haas*, 25 Ind. 281; *McWhinney v. Brinker*, 64 Ind. 360; *Lancaster v. DuHadway*, 97 Ind. 565.

Aside from the authority furnished by these cases, no reason occurs to us why this rule should not apply to all cases where a party who seeks equitable aid is not himself "willing to do equity," and we think it does apply. We, therefore, think that as the appellant did not pay, nor offer by his pleading to pay, the taxes legally due, the pleading was not sufficient, though it appeared that the sale was made without notice, and while the owner had sufficient personal property with which to pay the taxes.

As the second paragraph failed to show that some of the taxes for which this land was sold were not due, and these taxes were not paid, nor any offer made to pay them, it was likewise insufficient.

The conclusion of the court upon the facts found, that the appellee acquired a lien upon the land in dispute for the amount of the purchase-money, is strenuously assailed for various reasons. Every position taken, however, in opposition to such conclusion, is based upon the assumption that this land was not assessed. If not assessed, of course the

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appellee acquired no such lien, because there was no lien to acquire. The land, however, was, as we think, for the reasons given in the original opinion, assessed. It is true that it was misdescribed, and that such misdescription ran through all the proceedings, but this fact, though it vitiated the sale, did not destroy the lien of the State. The lien existed, and though the sale was inoperative to convey the title, it was effectual to transfer the lien. The mere misdescription of land intended to be assessed, and which can be ascertained, does not impair the lien of the State, nor prevent a purchaser from enforcing such lien by the appropriate remedy. *Cooper v. Jackson*, 71 Ind. 244; *Sloan v. Sewell*, 81 Ind. 180; *Parker v. Goddard*, 81 Ind. 294. A private sale of land for taxes after notice, and as prescribed by the statute, will transfer the lien of the State to the purchaser. *McWhinney v. City of Indianapolis*, 98 Ind. 182. The sale made in this case, therefore, operated as a transfer of the lien of the State to the appellee, notwithstanding such misdescription, and he was entitled to an order for its enforcement.

In the original opinion the conclusion was reached that the appellee was entitled to interest at the rate of twenty-five per centum upon the amount of the purchase-money, but subsequent reflection has induced the conclusion that the proper construction of sections 3 and 4 of the act of March 5th, 1883, Acts 1883, p. 95, which control the recovery of interest, only entitles the appellee to twenty per centum upon the amount of such purchase-money, and all subsequent taxes paid. The 3d section fixes the rate at twenty per cent., and the 4th section only applies to sales made under previous laws allowing a lower rate of interest. The original opinion is, therefore, thus modified, and the petition for a rehearing should be overruled.

PER CURIAM.—The petition is overruled.

Filed March 18, 1885.

Davidson v. The State.

No. 12,009.

DAVIDSON v. THE STATE.

CRIMINAL LAW.—*Former Conviction.*—Conviction for “unlawfully carrying a dangerous weapon” is no bar to a prosecution for any crime.

SAME.—*Carrying Dangerous Weapon.*—Conviction for a violation of section 1985, R. S. 1881 (carrying a deadly weapon concealed or openly with intent to injure another), is no bar to a prosecution for violation of section 1984 (drawing or threatening to use such weapon).

INSTRUCTIONS.—It is not error to refuse an instruction which has been substantially given in another form.

From the Henry Circuit Court.

— *Brown and R. Warner*, for appellant.

F. T. Hord, Attorney General, *G. W. Duncan*, Prosecuting Attorney, and *W. B. Hord*, for the State.

NIBLACK, J.—Indictment against Lincoln Davidson for a violation of the provisions of section 1984, R. S. 1881.

The first count charged Davidson with having, on the 15th day of December, 1883, unlawfully drawn and threatened to use a pistol upon one Elden Thornburg.

The second count charged Davidson with having, on the same day, unlawfully threatened to use a pistol, which he already had and held in his hands, upon the said Thornburg.

A jury found Davidson guilty as charged in the second count of the indictment, assessing a fine against him of \$25, and judgment followed upon the verdict.

After the evidence for the State was closed, Davidson, the defendant, produced a transcript from the docket of one Abraham Wrightman, a justice of the peace of Henry county, showing that, on the 19th day of December, 1883, one George M. Wright filed his affidavit before said justice, charging that on or about the 17th day of that month, at said county of Henry in this State, as affiant verily believed, Orloff Davidson did then and there unlawfully carry a dangerous and deadly weapon, to wit, a revolver, contrary to the form of the statute in such cases made and provided, and against the

99	366
198	163
99	366
168	590

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peace and dignity of the State of Indiana; that the said Orloff Davidson was arrested upon that charge and fined the sum of \$1 and adjudged to pay the costs of the prosecution against him. Wrightman testified that Orloff Davidson, the person named as defendant in the proceedings had as above before him, was also known as Lincoln Davidson, and was the same person who was the defendant in this cause, and that the two prosecutions grew out of, and were based upon, the same transaction.

The defendant then offered to read the transcript to the jury as evidence of a former conviction for the offence for which he was then on trial, but the court refused to permit him to read the transcript in evidence, and upon that refusal of the court a question was reserved upon the proceedings below.

As a bar to a subsequent prosecution, it is not necessary to the validity of a former conviction that it should have been had upon a formally sufficient charge. For such a purpose a former conviction resting upon a defective charge is sufficient. *Fritz v. State*, 40 Ind. 18; *State v. George*, 53 Ind. 434; *Greenwood v. State*, 64 Ind. 250.

But such a conviction must, nevertheless, be on some charge known to the law as a criminal offence, however defectively stated. 1 Bishop Crim. L., section 1021.

The affidavit filed before Justice Wrightman charged no criminal offence of any kind against Orloff Davidson. Section 1985, R. S. 1881, makes carrying a pistol concealed an offence. It also makes it a misdemeanor to carry a pistol openly with the intent, or avowed purpose, of injuring some other person. But neither that, nor any other section of the statute known to us, makes the simple carrying a pistol unlawful. In any event, there is a material difference between the two offences defined by section 1984, and those declared by section 1985, even conceding that the same pistol is used in every instance. Further conceding that the alleged conviction before Justice Wrightman was upon a sufficient affi-

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davit under one of the provisions of section 1985, it does not follow that it would have been a bar to the prosecution of the cause now before us. The true test to determine whether the plea of former conviction, or former acquittal, is a good bar, is to decide whether the crimes, as charged, are so far distinct that the evidence which would sustain one would not sustain the other. If they are so distinct, there has been no former jeopardy. Moore Crim. L., section 280; 1 Bishop Crim. L., section 1052; *State v. Elder*, 65 Ind. 282; *State v. Hattabaugh*, 66 Ind. 223; *Smith v. State*, 85 Ind. 553. This test makes the essential difference between a case like this, and such cases as might arise under section 1985, palpably apparent. The court did not, consequently, err in excluding the transcript of the proceedings had before Justice Wrightman upon the affidavit of Wright.

A question is also made upon the sufficiency of the evidence to sustain the verdict. As we read it, the evidence did not make a strong case against the defendant. We might, indeed, with propriety say that the case is not a satisfactory one upon the evidence, but there was an amount of evidence tending in some degree to sustain the verdict too great for us to wholly disregard. We have, therefore, no sufficient cause for disturbing the verdict upon the evidence.

It is also claimed that the court erred in refusing to give certain instructions asked for by the defendant. But the same legal propositions contained in the instructions refused were embraced in a more condensed, but at the same time sufficiently elaborate form, in an instruction given by the court upon its own motion. No substantial injury was, in consequence, inflicted by the refusal of the court to give the instructions asked for by the defendant.

The judgment is affirmed, with costs.

Filed Jan. 6, 1885.

Creighton v. Hoppis et al.

No. 11,266.

CREIGHTON v. HOPPIS ET AL.

99	369
124	436
99	369
140	491
140	498
99	369
152	474

DEED.—Mortgage.—Evidence.—Witness.—Declarations of Party in Possession.—

Vendor and Vendee.—In ejectment by the grantee against the heirs of the grantor, it was in question whether the deed was intended as a mortgage. It was in proof that the grantor remained in possession, erected buildings and insured them, and made other improvements.

Held, that the declarations of the grantor, while negotiating for said buildings, insurance, and while making improvements, concerning the acts so being done, were proper evidence for the defendants, so far as they tended to characterize such acts.

Held, also, that the grantee and his wife were not competent witnesses.

From the Kosciusko Circuit Court.

H. S. Biggs, W. S. Marshall and D. Turpie, for appellant.

J. S. Frazer, W. D. Frazer, L. H. Haymond and L. W. Royse, for appellees.

ELLIOTT, C. J.—In February, 1870, Wesley Creighton and his wife executed to the appellant a deed for a tract of land. Since the execution of that instrument Wesley Creighton has died, and his widow has married Solomon Hoppis, her co-appellee. The instrument is in form and terms an absolute deed of conveyance, and the appellant asserts title under it as such. The appellees contest the right of the appellant to possession, upon the ground that although the deed is absolute on its face, yet it was, in fact, nothing more than a mortgage.

The grantors remained in possession of the land, and Wesley Creighton during his life made improvements upon it. The appellees had a right to prove that permanent improvements were made by the deceased, because the act of improving supplied some ground for inferring that he was in possession as owner, and was not there at the sufferance of the person to whom he had executed a deed. The bare possession was of itself some evidence of ownership, and this evidence was

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strengthened by proof of the making of permanent improvements. The act of improving was one proper to be proved.

Possession by the person who has executed an instrument, purporting on its face to be an absolute conveyance of land, is in its nature equivocal, for it may be that he was in possession as tenant, or as a mortgagor, or by the mere sufferance of the grantee. As the possession may be equivocal, it becomes material to show its true character, and, in order to show this, what was done by the person in possession may be proved. The character of the possession may be determined in part from the acts of the person in possession. Of course, a grantor can not defeat his conveyance by mere evidence that he made improvements, but for the purpose of assisting in determining the true character of the conveyance and possession, it is competent to prove acts evidencing ownership. Acts of ownership performed without the knowledge of the grantee in a conveyance will not defeat his rights. They may, however, be properly given in evidence for the purpose of enabling the jury to ascertain the character of such rights.

We assume, on the strength of what has been said, that the acts of Wesley Creighton, done while in possession, were competent for the purpose of aiding the jury in determining the nature of the possession and the character of the conveyance.

It is the general rule that where an act is competent, so also are the declarations accompanying the act. It was said by Professor Greenleaf: "But no reason is perceived why every declaration accompanying the act of possession, whether in disparagement of the claimant's title, or otherwise qualifying his possession, if made in good faith, should not be received as part of the *res gestæ*; leaving its effect to be governed by other rules of evidence." 1 Greenl. Ev. (14th ed.), section 109. In a note to the text it is said: "Such declarations are now generally admitted." In *Sheaffer v. Eakman*, 56 Pa. St. 144, it was said: "The character of a possession may always be shown by contemporaneous declarations of the tenant." A like ruling was made in *Jackson v. Bredenbergh*,

1 Johns. 159, where it was said: "But for another purpose, the declarations of Mrs. Punderson were clearly evidence, namely, to show in what character, or with what intent, she entered, and held possession of the premises in dispute." After quoting from 1 Coke's Institutes, 374, *a*, the Supreme Court of Connecticut said: "This ancient rule of the law necessarily implies, that the acts and declarations of the occupant are good evidence, to demonstrate the character and intent of the possession." *Williams v. Ensign*, 4 Conn. 456. Of a like import was the language of the court in *Thomas v. Wheeler*, 47 Mo. 363, where it was said: "The declarations or admissions of one in possession of property, explanatory of his possession—as that he holds it in his own right, or as a tenant or trustee of another—are admissible evidence because they explain the character of his possession. *Darrett v. Donnelly*, 38 Mo. 492, and cases cited. The declarations here made, cotemporaneous with the possession and while it continued, were also admissible as part of the *res gestæ*. *Boydén v. Moore*, 11 Pick. 363."

The question of the competency of evidence of declarations, made by one in possession at the time of doing an act on the land, was carefully discussed in *Downs v. Lyman*, 3 N. H. 486, and the court thus expressed the rule: "The rule of law is, that where it is necessary, in the course of a cause, to inquire into the nature of a particular act, and the intention of the person, who did the act, proof of what the person said, at the time of doing it, is admissible in evidence, for the purpose of showing its true character." In *Turpin v. Brannon*, 3 McCord, 160, it was said: "But the declarations of a party when accompanied by an act may be received as explanatory of that act, as constituting a part of the *res gestæ*." In the following cases like statements of the rule will be found: *Kirkland v. Trott*, 66 Ala. 417; *Sears v. Hayt*, 37 Conn. 406; *Stephens v. Williams*, 46 Iowa, 540; *Amick v. Young*, 69 Ill. 542; *Sheaffer v. Eakman*, 56 Pa. St. 144; *Hunnicut v. Peyton*, 102 U. S. 333; *Abeel v. Van Gelder*, 36 N. Y. 513;

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Swettenham v. Leary, 18 Hun, 284. Our own cases recognize and enforce the rule. *Lane v. State*, 16 Ind. 14; *Boone County Bank v. Wallace*, 18 Ind. 82; *McConnell v. Hannah*, 96 Ind. 102.

In the cases cited by the appellant the evidence consisted of naked declarations unaccompanied by any act, and in such cases a very different rule obtains. We do not hold, nor mean to hold, that declarations unaccompanied by an act are admissible; on the contrary, we understand the rule to be against their admissibility. Nor do we hold that declarations accompanying an act are competent, where the act itself can not be proved, but we do hold that where the act is competent, so also are the declarations made at the time it was performed. Even in such cases, it is only declarations explanatory of the act and immediately connected with it that are admissible.

Narratives of a past transaction, although given at the time an act is done, are not competent. In order that the declarations may be competent, it must appear that they relate to the thing then done, and that they have a direct connection with it.

It is not necessary that the declarations should be made while the claimant is actually on the land; it is sufficient to establish their competency, if it appears that they were made in connection with some act relating to the character of the possession. This is expressly ruled in the cases of *Abeel v. Van Gelder*, *supra*, *Swettenham v. Leary*, 18 Hun, 284, *Smith v. McNamara*, 4 Lans. (N. Y.) 169. In the case before us the declarations objected to most earnestly were made while Wesley Creighton was at a neighboring town, but while he was still in possession of the land, and negotiating for building a house on it, and were, under the rule laid down in the cases cited, clearly admissible.

Declarations made by Wesley Creighton when he applied for a policy of insurance were admitted in evidence, and we

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think there was no error in this ruling, for it appears that he was in possession of the land at the time, that the declarations concerned the property and were explanatory of the possession.

It is not for the court to determine the weight of evidence, for, if the evidence is at all material, it must be admitted if it is otherwise competent. *Nave v. Flack*, 90 Ind. 205 (46 Am. R. 205). The weight to be attached to declarations such as those given in evidence in the present instance was a question for the jury or the court trying the case. Of themselves, they are not sufficient to overthrow a deed, or transform an absolute conveyance into a mortgage, but are proper evidence to be considered in connection with other facts and circumstances.

The action was prosecuted against the heirs of a deceased person, and the plaintiff was not a competent witness as to matters which occurred prior to the death of the ancestor.

Where the husband is not a competent witness, the wife is not. R. S. 1881, section 501.

There was evidence fairly tending to support the verdict, and that requires us to decline to disturb it. Affirmed.

Filed Sept. 27, 1884.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—In the argument of appellant's counsel, on the petition for a rehearing, is this quotation: "The admissions of a party are evidence against himself, whether made in connection with an act done or not, but a party can not, as a general rule, prove his own statements as evidence for himself." *Scobey v. Armington*, 5 Ind. 514; *Denman v. McMahon*, 37 Ind. 241. Many authorities are cited in support of this statement of the law. The work of counsel was entirely superfluous, for we stated this general rule in our former opinion quite as broadly as any case cited by counsel states it. In no particular did we impugn the correctness of this general principle. What we did decide is that where a

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grantor is in possession, and does acts while in possession evidencing ownership, his declarations accompanying and connected with those acts are competent evidence. We put our decision upon the ground that where an act is itself competent, so also are the declarations made at the time it was performed. In doing this we opened no new path, but followed one long since laid out and trodden by many courts. Not one of the many cases now cited by counsel controverts this doctrine.

Possession is an act indicative of ownership, and acts done while in possession evidencing ownership are competent, and the rule is a universal one that where the acts are competent evidence, so also are declarations made while performing them. Of course, the declarations of a grantor, not made while in possession or while engaged in the performance of an act, are not competent in impeachment of his grantee's title. It is true that the deed of the appellees' deceased ancestor *prima facie* conveyed full title, because it was absolute on its face. *Pierson v. Doe*, 2 Ind. 123. But it is equally true that such a deed may be shown to be a mortgage, and one fact tending to show this is that the grantor retained possession. Counsel concede this to be true, but assert that the rule applies only where the possession is adverse. In thus limiting the rule counsel are in error. Possession by the grantor is an act tending to show ownership, and, as such, is competent; therefore, the declarations accompanying acts explaining and exhibiting the principal act of possession are also competent. We do not deem it necessary to again comment upon the authorities cited in our former opinion, for they are there fully discussed.

The case of *Doe v. Moore*, 4 Blackf. 445 (30 Am. Dec. 666), belongs to an entirely different class. There the declarations sought to be introduced in evidence were not accompanied by an act evidencing ownership, but were statements rehearsing a past transaction. The difference between that case and this is essential. In that case there was no act accompanying the

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declarations, and they merely recited a past occurrence, while here the declarations accompanied an act, and were not mere narratives of past occurrences. Both acts and declarations were things of the then present, and not things of the past.

It can not be granted that the appellees could not be permitted to prove these acts and declarations until they had established the fact that the instrument was in truth a mortgage, for it was enough that there was evidence tending to show that fact. When such evidence was introduced, then the appellees had a right to strengthen it by evidence of their ancestor's acts and concurrent declarations. If it were true, as counsel assert, that the appellee was not entitled to introduce evidence of acts and declarations until after they had fully proved that the instrument was a mortgage, there would be no need for them, for the case would be fully made out without them. We need not decide what the rule would be, if the instrument were conceded to be an absolute deed, for the case before us belongs to a class which forms a bold exception to the general rule that a written instrument can not be contradicted by parol evidence.

Petition overruled.

Filed Jan. 7, 1885.

No. 11,209.

EILER v. CRULL.

HUSBAND AND WIFE.—*Abandonment.*—*Liability for Wife's Necessaries.*—A husband who abandons his wife, without her fault, and leaves her for a period of months wholly without means of support, is liable to her son who provides for her necessities during that time, without any express request or promise of the husband to pay therefor.

From the Henry Circuit Court.

J. M. Brown, J. Brown and W. A. Brown, for appellant.

J. H. Mellett and E. H. Bundy, for appellee.

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BLACK, C.—The appellee sued the appellant and recovered judgment against him for \$304, for boarding and maintenance furnished by the plaintiff to the wife of the defendant for twenty-two consecutive months, commencing in October, 1880.

The appellant has assigned as error the overruling of his motion for a new trial.

He abandoned his wife, in said month, without her fault, taking with him all the household furniture and leaving her wholly destitute of money, food or means of sustenance, and thereafter he furnished her nothing.

She owned a tract of land of about one acre, with a small house thereon. About one month before said abandonment, she leased said premises, for a period of two years, to the plaintiff, her son by a former marriage, who, by the terms of the contract of letting, was to have the use of said premises for that period, in consideration of certain repairs which he agreed to make thereon, and which he did make.

At the request of said wife, after she had been so abandoned, the plaintiff took her to said premises, where he resided, and thereafter he maintained her there at his expense, she having no property whatever except said premises. The plaintiff knew that she had no other property, and it was agreed between him and her that he would try to get some compensation for her maintenance from the defendant.

The only question is whether the plaintiff could recover, notwithstanding the wife's ownership of said property, there being no express request or promise on the part of the defendant.

During the period in which the plaintiff provided necessities for the abandoned wife, not upon her credit, no means of support accrued or could accrue to her from the real estate owned by her. For that period the defendant left her wholly without means of support; and having done so without her fault, he was liable to the plaintiff for providing for her necessities, without the defendant's express request or his express

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promise to pay therefor. *Litson v. Brown*, 26 Ind. 489; *Watkins v. DeArmond*, 89 Ind. 553.

The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the appellant's costs.

Filed Jan. 9, 1885.

No. 11,639.

LEWIS v. CHRISTIE.

INSTRUCTIONS.—*Invading Province of Jury*.—It is error to instruct the jury in the language of 1 Greenl. Ev., sec. 200, expressing the necessity of caution as to evidence of admissions of parties, and the reasons for such caution, as that author gives them, because it invades the province of the jury as to matters of which the jurors are the exclusive judges.

SAME.—*Harmless Error*.—An instruction against a defendant, which is erroneous, will not be held harmless merely because his answer was bad.

From the Jefferson Circuit Court.

A. D. Vanosdol, H. Francisco, E. R. Wilson, J. W. Gordon and L. O. Bailey, for appellant.

E. G. Hay, W. S. Friedley and C. A. Korbly, for appellee.

BICKNELL, C. C.—In this case several errors are assigned, but they are all waived except alleged errors of the court in giving and refusing instructions.

The appellee brought this suit against the appellant to recover \$1,000, as liquidated damages for the breach of the following written contract:

"Know all men by these presents, that this agreement, entered into by and between James H. Christie of the first part, and Samuel B. Lewis of the second part, witnesseth, that in consideration of James H. Christie of the first part making Samuel B. Lewis a warranty deed to two-fifths of the undivided interests in the real estate of the late Preston Christie, deceased, valued at \$1,400, situate in Ripley county, Indiana, the said Samuel B. Lewis of the second part agrees to make

99	377
127	180
99	377
154	640
99	377
104	161
99	377
166	489

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to James H. Christie of the first part a warranty deed to the following lots: Nos. 19 and 20 of the Lewis addition, situated in Canaan, Jefferson county, Indiana, valued at \$700, and his good-will and influence valued at \$700, and the party of the second part is not to locate as practitioner of medicine and surgery at any point within five miles from Canaan, in said county, unless the party of the first part consents thereto in writing, and it is further stipulated and agreed that the party of the second part, violating the terms of this agreement, shall pay the party of the first part \$1,000, as liquidated damages, in full of such breaches of this agreement. This agreement is signed in duplicate. Witness our hands and seals this 27th day of February, 1882.

"JAMES H. CHRISTIE. [SEAL.]

"SAMUEL B. LEWIS. [SEAL.]"

This suit was commenced in July, 1883. The complaint avers that the deeds provided for in the agreement were executed, and that the parties respectively were put in possession of the property thereby conveyed. The breach alleged is that the defendant has removed back to said town of Canaan, has located there, and is practicing medicine and surgery in said town and vicinity, and within five miles of said town, without the written consent of the plaintiff, and has withheld from the plaintiff his good-will and influence, and is using all his influence against the plaintiff and trying to prevent him from receiving any benefit from said contract. The complaint states that the defendant has violated said contract, as aforesaid, all the time from April 1st, 1883, to the time this suit was commenced. The defendant answered in two paragraphs.

1. Admitting the execution of the contract as alleged in the complaint, and averring that about the 3d of March, 1882, the parties made a partnership for the practice of medicine and surgery in said town of Canaan, and by its terms said defendant was to practice medicine and surgery there until the autumn of 1882, and then was to move to Canaan with his

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family and continue the practice of medicine and surgery there as long as they could agree. Wherefore, etc.

2. Admitting the execution of the contract as stated in the complaint, and averring that in the month of March, 1882, the plaintiff and defendant rescinded the contract sued on by forming a partnership for the practice of medicine and surgery at said town of Canaan, and did so practice from that time onward, so long as they could mutually agree. Wherefore, etc.

A demurrer to the first of these paragraphs of answer was overruled, and the plaintiff filed a reply to the entire answer, denying each of its allegations. The issues were tried by a jury, who returned a verdict for the plaintiff for \$1,000, the amount of the liquidated damages.

A motion by the defendant for a new trial was overruled, and judgment was rendered on the verdict. The defendant appealed. The only matter relied on by the appellant for the reversal of the judgment is, that the court erred in giving and refusing instructions.

The appellee claims that the evidence is not in the record, and that, therefore, the instructions can not be considered. He says a certain paper mentioned in the testimony of John Cramer ought to be in the bill of exceptions. The defendant being a witness in his own behalf, the plaintiff's counsel, on cross-examination, asked him as to an alleged conversation between him and John Cramer at Cramer's shoe shop, March 4th, 1882.

Instead of stating the alleged conversation orally to the defendant, it appears that the plaintiff's counsel read it to him from a paper; the defendant denied that any such conversation had taken place; the question thus put to Dr. Lewis, containing the whole of the alleged conversation, appears in the bill of exceptions. Afterwards, John Cramer was sworn to prove that there was such a conversation, and he testified thus: "I live at Canaan; I am a shoemaker; I have lived there four years in September; I lived in Madi-

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son before I went to Canaan; I know the parties; I have known the defendant ever since I moved to Canaan, and Dr. Christie afterwards; conversation with Dr. Lewis at Canaan in my shoe shop, March 4th, 1882; I did have such conversation; Dr. Lewis said just them very words that paper speaks; he did say so,' (as in last question stated)."

The appellee claims that the bill of exceptions does not show what this "last question" was. The fair inference is that this "last question," to which reference is thus made, contained a statement in full of the alleged conversation and was read to Cramer from the paper in presence of the jury, but the appellee claims that neither the question, nor the paper, nor its contents are set out in the bill of exceptions.

The statement in the bill of exceptions is that John Cramer in answer to some "last question" replied, "Dr. Lewis said the very words that paper speaks," but the appellee claims that this "last question" is not set out, and that the bill of exceptions does not purport to show what "that paper" did speak.

We are of opinion that the statement in the bill of exceptions, "this was all the evidence given in the case," is not falsified by the record. Undoubtedly, the question put to Dr. Lewis in reference to the alleged conversation with Cramer at the shoe shop, in March, 1882, was read to Lewis from a paper; it does not appear that the paper was offered in evidence; such a reading is the same in effect as a question put without any paper. It seems that the same question as to the alleged conversation was read to the witness Cramer from the paper, to which he replied, "'Dr. Lewis said just the very words that paper speaks; he did say so,' (as in last question stated)."

We think that from the cross-examination of Lewis and the entire examination of Cramer, as given in the bill of exceptions, it sufficiently appears that the "last question," mentioned in Cramer's testimony, is the same question read first to Lewis from the paper and then to Cramer from the paper,

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and we think the cross-examination of Lewis states exactly what the question was. We, therefore, can not say that no question is presented on the instructions.

Some of the objections to the instructions are expressly waived by the appellant in his brief. We need not consider any of the others except the twelfth, given by the court to the jury at the request of the plaintiff and excepted to by the defendant.

The twelfth instruction given by the court is as follows:

"12. Evidence of the admissions of the parties to this action has been given to you. Such evidence ought to be received with great caution. Such evidence, consisting of mere repetition of oral statements, is subject to much imperfection and mistake, the party himself either being misinformed, or not having clearly understood his own meaning, or the witness having misunderstood him. It frequently happens, also, that by a witness unintentionally altering a few of the expressions really used, gives an effect to a statement, completely at variance with what the parties actually did say; but, in a case where you find that an admission is deliberately made and precisely identified, the evidence it affords is often of the most satisfactory nature."

This instruction is taken from section 200 of 1 Greenleaf on Evidence, but it is changed; Greenleaf says: "The party himself either being misinformed, or not having clearly *expressed* his own meaning;" whereas the instruction here given is, "not having clearly *understood* his own meaning."

The appellant claims that the above instruction was erroneous. He says: "What the parties had done they knew; they spoke of their own transactions; they could not have been misinformed. * * * But how could a party fail clearly to understand his own meaning? It is easy for any one to 'not clearly express his own meaning, but not to understand his own meaning,' is impossible, if he has any meaning."

We need not determine whether the instruction, if otherwise valid, would be vitiated by this error, because this court

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has held that said section 200 of 1 Greenleaf on Evidence, ought not, in Indiana, to be given to the jury as law in an instruction by the court.

In *Finch v. Bergins*, 89 Ind. 360, the judgment was reversed because the court below had given an instruction adopting the very words of Greenleaf in the section above mentioned, and Howk, J., in delivering the opinion of the court, said: "Of this section of Greenleaf's text, in a similar instruction in *Davis v. Hardy*, 76 Ind. 272, this court said: 'To give it in a charge, as written, would, in this State, be an invasion of the jury's exclusive right to judge of the credibility and weight of evidence. It is proper matter of argument that such evidence is subject to imperfection and discredit, for the reasons suggested, and the court may direct the jury's attention to the subject. But it is not for the court to say, as matter of law, in reference to the evidence of this kind, given in a particular case, that it is subject to much imperfection; or that "it frequently happens that the witness, by unintentionally altering a few expressions really used, gives an effect to the statement completely at variance with what the party did say;" or that, where "the admission is deliberately made and precisely identified, the evidence is often of the most satisfactory nature." These are matters of fact, experience and argument, but not otherwise the subject of legal cognizance.'

"So, in *Garfield v. State*, 74 Ind. 60, in commenting on an instruction transcribed, like the one above quoted, from 1 Greenleaf on Evidence, this court said: 'It is not every statement of the law found in a text-book or opinion of a judge, however well and accurately put, which can properly be embodied in an instruction. * * * The instruction under consideration does not contain a single proposition of law, but only declarations of supposed facts, which common experience has perhaps established as true. The teachings of experience on questions of fact are not, however, doctrines of law, which may be announced as such from the bench. * * * They may well enter into the arguments of attorneys,

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* * * but the jury, not the judge, is the arbiter of such contentions. * * * The most that the judge may do, under our practice, which leaves questions of fact entirely to the jury, is to direct the attention of the jurors to such propositions and leave them, in the light of their experience, to say what credit should be given to any testimony on account of its alleged doubtful character.’”

In the case of *Woollen v. Whitacre*, 91 Ind. 502, this court said, by HAMMOND, J.: “The decisions of this court are numerous to the effect that it is error for the court to say or intimate to the jury that any circumstance or fact should be considered by them to the disparagement of a witness’s testimony.” And the rule above indicated in *Finch v. Bergins*, *supra*, is supported by *Nelson v. Vorce*, 55 Ind. 455; *Pratt v. State*, 56 Ind. 179; *Millner v. Eglin*, 64 Ind. 197 (31 Am. R. 121); *Jackman v. State*, 71 Ind. 149; *Works v. Stevens*, 76 Ind. 181.

The foregoing authorities clearly show that the court erred in giving to the jury the aforesaid instruction No. 12, and for this error of law the motion for a new trial ought to have been sustained.

The judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things reversed, at the costs of the appellee, and this cause is remanded for a new trial.

Filed Nov. 19, 1884.

ON PETITION FOR A REHEARING.

BICKNELL, C. C.—The appellee admits that the court below erred in its instruction No. 12, and he states that he does not ask this court to reconsider its ruling upon said instruction, but he claims a rehearing because, as he alleges, the defences of the appellant are bad, and, therefore, the erroneous instruction was harmless.

The appellee demurred to the appellant’s first defence, and

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his demurrer was overruled, but as he has not assigned any cross errors, he is not in a position to question the ruling of the court on said demurrer. Buskirk Pr. 119; *Jenkins v. Peckinpugh*, 40 Ind. 133.

The appellee considered the second defence sufficient, and took issue on it. If at the proper time he had moved for judgment upon the pleadings, and upon the overruling of that motion had excepted, he could have presented the question arising thereon by a proper assignment of cross error. There is no such question now before us.

The petition ought to be overruled.

PER CURIAM.—The petition for a rehearing is overruled.

Filed March 13, 1885.

No. 11,613.

METZLER ET AL. v. METZLER.

DIVORCE.—Alimony.—Where, for the fault of the husband, a divorce is granted to the wife with custody of the only child, the husband's property, beyond all his debts, being worth at least \$3,500, alimony in the sum of \$1,590 is not excessive.

SAME.—Parties.—Pleading.—Fraudulent Conveyance.—In a suit by a wife for a divorce, making also defendant a stranger, with a view to subject lands conveyed to him to the payment of alimony, the complaint against him is bad on demurrer, if it do not show that the conveyance was made to hinder or defraud, and that it was without adequate consideration.

EVIDENCE.—Practice.—A question to a witness, so indefinite that the answer to it may, or may not, disclose matter not pertinent to the issues, may be allowed, or not, in the discretion of the court.

From the Huntington Circuit Court.

T. R. Marshall and *W. F. McNaghy*, for appellants.

W. A. Branyan and *T. G. Smith*, for appellee.

NIBLACK, J.—Suit by Elizabeth Metzler against her husband, William Metzler, for a divorce, in which Joseph Metzler, the father of the said William, was made a co-defendant

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to answer as to certain property interests affecting the plaintiff's demand for alimony.

After making the necessary averments as to the residence of the plaintiff, the complaint charged that she and the defendant William Metzler were married in December, 1875, and that they had lived together as husband and wife until early in June, 1882, which was previous to the commencement of this suit; that the said William had failed to make suitable provision for his family for a period of two years previous to their separation; that the said William had also treated the plaintiff in a cruel and inhuman manner in several specified respects, and especially in falsely and wickedly accusing her of the crime of adultery and other lewd conduct, by reason of all which the plaintiff was compelled to separate herself from the said William and live apart from him since early in June, 1882, the time of their separation above named; that during the cohabitation of the plaintiff with the said William, he became and was the holder of the legal title to a house and lot in the city of Huntington, in this State, which had been purchased and improved by the proceeds of their joint labor, of the probable value of \$3,500; that on the 26th day of April, 1882, the said William bargained and sold said house and lot to the above named Joseph Metzler, and by falsely representing to her, the plaintiff, that her lewd and improper conduct, and the scandal resulting therefrom, had made it necessary for them to emigrate to the west, and by the violent and threatening use of a revolver in his hands, which placed her under great fear and actual duress, coerced and compelled her to unite with him in a conveyance of said house and lot to the said Joseph, by which she was seemingly made to relinquish her inchoate interest in, and all other rights to, said house and lot; that the said Joseph had full knowledge of the wrongful and coercive conduct of the said William in procuring the plaintiff to execute a conveyance to him, as above stated, and participated therein; that

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she joined in the execution of said conveyance against her will and only because she was coerced to do as herein charged; that afterwards the said William ceased to talk of emigrating west, but continued to inflict a tirade of abuse upon the plaintiff and to repeat his charges of adultery against her; that at the time of the plaintiff's separation from the said William he owned particularly described property, real and personal, of the aggregate value of \$11,000, including the house and lot conveyed as above to the said Joseph; that the said William and Joseph had been and still were conspiring to cheat and defraud her, the plaintiff, out of her just share and all interest in the property herein above referred to, and that compelling her to sign the deed to the said Joseph was one of the means resorted to for that purpose; that the said William had been since the separation, and was still, selling off his remaining property with a view to secreting the proceeds and defrauding the plaintiff; that in consequence there did not remain property enough, besides the house and lot conveyed to the said Joseph, subject to execution, to satisfy any reasonable sum which might be decreed to the plaintiff for alimony. Wherefore the plaintiff, in addition to a decree for a divorce, demanded judgment in the sum of \$5,000 for alimony, and that such judgment should be decreed to be a lien upon the house and lot conveyed to the said Joseph as herein above set forth.

The separate demurrer of Joseph Metzler for want of sufficient facts being first overruled, and issue being joined, the court made a finding that the plaintiff was entitled to a decree of divorce from her said husband William Metzler; that she ought to have the custody of their only child; that the sum of \$1,590 should be allowed to her for alimony, and be decreed to be a lien upon the house and lot conveyed to Joseph Metzler, and decreed accordingly.

Questions were reserved upon the evidence as well as upon the amount of alimony allowed to the plaintiff. The evidence

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does not impress us as having made a strong case in favor of the plaintiff for a divorce, but there was evidence tending to sustain some of the material allegations of the complaint as against the defendant William Metzler. We can not, therefore, disturb the finding of the court for any supposed insufficiency of the evidence to sustain it. *Graft v. Graft*, 76 Ind. 136.

One of the witnesses called by the defendant testified as follows: "I am a sister of the defendant William. He is not a talkative man. I was about their house frequently after he was married."

Counsel for the defendants then said to the witness, "At such times as you were present you may state how the defendant William treated his wife." Counsel for the plaintiff objected to the witness answering that question, and the court sustained their objection, and it is now claimed that the court palpably erred in its decision in that respect.

We think the court, with much propriety, might have permitted the question to be answered, but, strictly speaking, it was too indefinite and uncertain as to the period of time to which the attention of the witness ought to have been directed. All the alleged cruel treatment specifically complained of by the plaintiff, and identified by any witness, occurred within a few months before the separation, and consequently the attention of the witness ought to have been called to the period of time during which serious troubles existed between the plaintiff and her husband. In the absence, therefore, of any distinct statement as to what was proposed to be proven by the witness, we can not hold that the court materially erred in declining to permit the question to be answered. The defendant William Metzler admitted at the trial that he was worth the sum of \$3,500 over his indebtedness, and there was evidence tending to show that he was really worth a considerably larger sum. Considering the evidence, therefore, in connection with the fact that the burden

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of the care and custody of the child was imposed upon the plaintiff, we would not feel justified in declaring that the amount allowed to her for alimony was excessive.

Third persons may doubtless, for many incidental purposes, be made parties to a suit for a divorce, but to authorize a judgment or decree to be properly entered against any third person thus made a party, a valid cause of action must be alleged as well as established against him, as in other cases. As has been observed, the complaint in this case did not charge that William Metzler caused the conveyance of the house and lot, therein referred to and described, to be made to his father for the purpose of hindering or delaying the collection of any amount the plaintiff might thereafter recover against him for alimony, since there was nothing alleged from which we can infer that a separation was in contemplation by any of the parties at that time. Neither was it charged that the conveyance was made without an adequate consideration.

The only wrongful acts in which the complaint charged Joseph Metzler with having participated were the coercive means used to induce the plaintiff to join in the execution of the deed to him, and entering into and continuing in a conspiracy with his said son William to cheat and defraud her out of her just share and interest in the said William's property, the only specification being his participation in the procurement of the plaintiff to execute the deed above mentioned, which, as we construe the phraseology used, constituted the *gravamen* of all the wrongs in which he had borne any specific part. Nothing was consequently charged which rendered the deed invalid, as between the defendants, when it was executed, and it is now a well settled rule of decision that a valid deed can not be converted into a fraudulent and voidable instrument by any subsequent misconduct of the parties, or either one of them. *Sherman v. Hogland*, 54 Ind. 578; *Bishop v. State, ex rel.*, 83 Ind. 67; *Barkley v. Tapp*, 87 Ind. 25.

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Conceding the charges made against the defendants as to the manner in which the plaintiff was constrained to sign and acknowledge the deed to the house and lot in the city of Huntington to have been true, as Joseph Metzler's demurrer did, for the purposes then in view, concede them to be, they only made, or tended to make, a proper case for setting aside and cancelling the deed as to her. But that was not the relief sought by the complaint, and, if it had been, it would have been inconsistent with the demand for a divorce, which, if granted, would terminate the plaintiff's inchoate interest in all her husband's real estate.

The claim that the amount of alimony which might be allowed to the plaintiff should be decreed to be a lien upon the house and lot conveyed to Joseph Metzler was, upon the evident theory, that the conveyance had been made to hinder, delay and defraud her in the collection of such alimony, and, for the reasons given, that theory was not supported by the facts averred in the complaint. It follows, therefore, that the separate demurrer of Joseph Metzler to the complaint ought to have been sustained. It is due, perhaps, to Joseph Metzler, as well as to a proper disposition of the cause, to state that, in any event, the finding as against him was not, as we believe, sustained by sufficient evidence, or, indeed, by any evidence tending to compromise him seriously in any way.

So much of the judgment appealed from as decreed the amount of alimony recovered by the plaintiff, against William Metzler, to be a lien upon the real estate conveyed by her and him to Joseph Metzler, is consequently reversed. In all other respects the judgment is affirmed, all at the costs of the appellant William Metzler.

Filed Dec. 9, 1884. Petition for a rehearing overruled March 13, 1885.

Gallimore *et al.* v. Blankenship *et al.*

No. 11,593.

PAYNE v. WEST ET AL.

DEPOSITION.—*Certificate.—Mistake.—Clerical Error.*—Where an officer by whom a deposition has been taken states in his certificate that the *deponent*, instead of the *deposition*, was reduced to writing, the mistake is a mere harmless clerical error.

From the Perry Circuit Court.

E. E. Dumb and *H. J. May*, for appellant.

S. Joseph and *S. B. Hatfield*, for appellees.

ELLIOTT, J.—The officer by whom the deposition of one of the appellee's witnesses was taken, instead of stating in his certificate that "the deposition was reduced to writing," stated that "the deponent was reduced to writing." There is more of the ludicrous than there is of harm in the officer's mistake. It is apparent that the error is a mere clerical one, harming nobody. The context plainly shows the character of the mistake, and that it was the deposition that was properly reduced to writing.

Judgment affirmed, with five per centum damages.

Filed Jan. 7, 1885.

No. 11,801.

GALLIMORE ET AL. v. BLANKENSHIP ET AL.

SUPREME COURT.—*Motion to Tax Costs.—Bill of Exceptions.—Practice.*—Where the grounds of a motion to tax costs, and the exception to a ruling thereon, are not shown by a bill of exceptions, no question is before the Supreme Court in relation to the ruling.

SAME.—*Weight of Evidence.*—If the evidence is conflicting, the Supreme Court will not undertake to determine the preponderance.

From the Morgan Circuit Court.

G. A. Adams and *J. S. Newby*, for appellants.

G. W. Grubbs and *M. H. Parks*, for appellees.

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BLACK, C.—The appellees filed their petition for drainage, under the act of April 8th, 1881, R. S. 1881, section 4273, *et seq.*, as amended in 1883, Acts 1883, p. 173.

The commissioners of drainage having made their report, favorable to the construction of the ditch, the appellees, owners of lands to be affected, remonstrated against the report, for various grounds of remonstrance, not including the first statutory ground. Acts 1883, p. 176, section 3.

The remonstrances were tried by the court, the finding being against them, except that it was found that the assessment against the land of one remonstrator should be reduced in a certain amount, and that this amount should be added to the assessment against certain other land affected. The court made its order establishing the proposed work, approving the assessments as so modified, and directing one of the commissioners to construct and make the proposed work.

Under an assignment that the court erred in overruling the motion of the remonstrators for a new trial, the appellants have discussed the question of the sufficiency of the evidence.

We have carefully read the evidence, and we find that it supports the finding. As to some of the facts there was conflict in the testimony, but we can not undertake to determine the preponderance.

The appellants have also assigned as error the overruling of their motion to tax the costs; but the grounds of the motion and the exception to the ruling thereon not being shown by bill of exceptions, no question is before us in relation to this ruling. *Urton v. Luckey*, 17 Ind. 213; *Tilman v. Harter*, 38 Ind. 1; *State v. Saxon*, 42 Ind. 484.

The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the costs of the appellants.

Filed Jan. 9, 1885.

Stevens v. The Lafayette and Concord Gravel Road Company.

No. 11,475.

STEVENS v. THE LAFAYETTE AND CONCORD GRAVEL ROAD
COMPANY.

NEGLIGENCE.—Pleading.—A complaint by a turnpike company against an adjoining land-owner for negligently constructing his fence across a stream, so that it obstructed the water, etc., whereby plaintiff's bridge was destroyed, which fails to negative contributory negligence by the plaintiff, is bad on demurrer.

SAME.—Evidence.—It is error in such case, where the general denial is pleaded, to refuse evidence for the defendant showing that his fence was built in the best manner to avoid injury to the bridge; but evidence that he offered to repair or reconstruct the bridge is not admissible.

From the Tippecanoe Circuit Court.

F. B. Everett, for appellant.

G. O. Behm and *A. O. Behm*, for appellee.

BICKNELL, C. C.—The appellee alleged in its complaint that it had a bridge across a small stream; that the bridge was built on stone and brick abutments; that the defendant owned the lands and fences along the east line of the appellant's gravel road and across said stream; that the defendant, in November, 1880, "placed barbed wire strands on and along the fence over said stream, in such a careless and negligent manner that the same obstructed the usual flow of water arising from freshets, and damned the same up to a great height, so that the fence was torn down and gave way, and the sudden flow of the great quantity of water, thus damned up, rushed with great force and violence against the abutments of said bridge, and washed and tore the same away, and utterly destroyed said bridge, to the damage of the plaintiff of \$500," and that the plaintiff was thereby deprived of the right to take tolls on said road for four months, while said bridge was in course of repair. Wherefore, etc.

The defendant demurred to the complaint for want of facts sufficient. The court overruled the demurrer. The defendant answered by a general denial and a special defence. A

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motion by the plaintiff to strike out the special defence was sustained. The issue was tried by the court, who found for the plaintiff, with \$195 damages.

The defendant's motion for a new trial was overruled, and judgment was rendered on the finding. The defendant appealed. The errors assigned are :

1. In overruling the demurrer to the complaint.
2. In sustaining the motion to strike out the special defence.
3. In overruling the motion for a new trial.

There was no error in striking out the special defence, because its material averments were all capable of proof under the general denial. *Boyce v. Graham*, 91 Ind. 420. But the demurrer to the complaint ought to have been sustained.

The complaint seeks to recover damages for negligence. The allegation is that the defendant "placed barbed wire strands along his fence in such a negligent and careless manner that," etc., and there is no allegation that the injury was sustained without the fault of the plaintiff, and there are no facts averred from which it may be inferred that the plaintiff was without fault. Such allegations in such cases were not formerly required ; they are not found in the precedents in Chitty's Pleading. But ever since the case of *President, etc., v. Dusouchett*, 2 Ind. 586, it has been invariably held in Indiana, that a complaint, seeking damages for negligence, must show that no fault of the plaintiff contributed to the injury. See the cases cited in *Pennsylvania Co. v. Gallentine*, 77 Ind. 322 ; *Mitchell v. Robinson*, 80 Ind. 281 (41 Am. R. 812) ; *City of Bloomington v. Rogers*, 83 Ind. 261 ; *Town of Rushville v. Poe*, 85 Ind. 83 ; *Indiana, etc., Co. v. Millican*, 87 Ind. 87 ; *Gheens v. Golden*, 90 Ind. 427 ; *Louisville, etc., R. W. Co. v. Lockridge*, 93 Ind. 191 ; *Board, etc., v. Legg*, 93 Ind. 523 (47 Am. R. 390).

Ordinarily, where a judgment is to be reversed for error in overruling a demurrer to a complaint, it is not necessary to consider reasons alleged for a new trial, but as the questions, presented in this case by the fourth and fifth reasons for a new

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trial, will probably again arise if the complaint be amended, we will decide them now.

The fourth reason is, that the court erred in refusing "to permit the defendant to prove and give in evidence that the act complained of in plaintiff's complaint was not negligent, but on the contrary was done in the best and most prudent way." We think the court erred in this ruling. As the complaint averred negligence, the defendant had a right to show, under the general denial, that there was no negligence.

The fifth reason is, that the court refused to permit the defendant to prove and give in evidence an offer by him to repair the injury and make the culvert as good as it was before the act complained of. We think there was no error in this ruling. The evidence thus rejected was offered "for the purpose of showing the fact and knowledge on the part of the plaintiff of the fact that the bridge or culvert, referred to in the complaint, was, before the act of defendant complained of, of insufficient capacity to carry off the water in heavy rains and of little value to the plaintiff on account of its insufficiency in size and its faulty condition." But an offer, by the alleged wrong-doer, to repair the injury, has no tendency to show such facts, it rather tends to show a supposed liability. The other reasons for a new trial present no question, because the evidence is not in the record.

The judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things reversed, at the costs of the appellee, and this cause is remanded with instructions to sustain the demurrer to the complaint.

Filed Dec. 17, 1884.

ON PETITION FOR A REHEARING.

BICKNELL, C. C.—The appellee now contends that the allegation of negligence made in its complaint was mere surplusage and amounted to nothing, and that, therefore, an

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avermment of want of contributory fault was not required. But, without the allegation of negligence, the complaint would have been clearly bad.

If my neighbor puts a common rail fence across a stream on the line of his land, and a great flood comes, which, at first, is resisted by the fence, but afterwards carries the fence away, and flows upon my land below, and washes away my fence, I have no cause of action for that damage. A man has a right to thus fence in his own land. Such a case falls within the maxim, "*Actus Dei nemini facit injuriam.*"

There is no difference in this respect between a barbed wire fence and common rail fence. If, however, a man builds his fence so negligently and carelessly, that by reason of such negligence and want of care his neighbor is injured, a cause of action may arise for the negligence, the negligence will then be the material averment, and the Indiana rule will be equally applicable whether the injured party be a natural person or a corporation.

The claim of the appellee in this petition is substantially that, whenever a man's barbed wire fence is washed away by a flood, he is liable for the damage done by the flood to his neighbor below. Such a proposition can not be sustained.

The petition for a rehearing ought to be overruled.

PER CURIAM.—The petition is overruled.

Filed March 12, 1885.

No. 11,600.

SCHINDLER ET AL. v. WESTOVER ET AL.

PRACTICE.—*Special Finding.*—*Conclusions of Law.*—*Exceptions.*—Where the court, at the request of one or more of the parties, makes a special finding of the facts and states thereon its conclusions of law, and the party objecting thereto merely saves an exception to the conclusions of law, and does not move either for a new trial or for a *venire de novo*, on appeal he admits that the facts are fully and correctly found, and the error, if any, is predicated solely upon the court's application of the law to the facts so found.

99	395
125	381
99	395
130	95
99	395
135	179
99	395
164	556

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BAILMENT.—*Mutuum or Exchange.—Sale.—Warehouseman.—Mingling of Grain.—Tenants in Common.—Ownership.—Demand.—Conversion.*—In November, 1882, one K., a miller and warehouseman, received of W. five hundred bushels of wheat, and agreed verbally to store such wheat until July 1st, 1883; that before that date W. might sell the wheat when he pleased, or that wheat would be returned if called for. The wheat was mingled with other wheat purchased by K., in his flouring-mill, which ground, when running, about two hundred bushels of wheat per day, and thereafter, until March 3d, 1883, ran about one-half of the time. In February, 1883, W. received from K. a writing, in evidence of the aforesaid verbal contract. On March 3d, 1883, K. ceased to run the mill, and, between that date and July 1st, 1883, he executed to the defendant S. and others a chattel mortgage on all the wheat in the mill, amounting at the time to nineteen hundred bushels. On June 30th, 1883, W. demanded of K. the wheat or the money on his contract, but received neither; and, on July 3d, 1883, W. demanded of the defendants S. *et al.*, while they were removing the wheat from the mill, that they should leave five hundred bushels thereof in the mill for him, which they refused to do, and afterwards converted all the wheat, and the proceeds thereof, to their own use.

Held, upon the foregoing facts, that the contract of K. with W., verbal or written, was not a *mutuum* or exchange, nor a sale of the wheat, but that it was a contract of bailment, pure and simple.

Held, also, that, under such contract, K. and W. became and were tenants in common of the nineteen hundred bushels of wheat, remaining in the mill, W. to the extent of his five hundred bushels, and K. as to the residue; and that K. could not sell or mortgage W.'s wheat to the defendants, so as to divest the plaintiff's title thereto, or to authorize its removal from the mill, after W.'s demand that it should be left there.

Held, also, that when, after such demand, the defendants removed the wheat from the mill and converted the same to their own use, they became and were liable in damages to the plaintiff, as the owner of the wheat so converted, for its fair value.

From the St. Joseph Circuit Court.

A. Anderson, for appellants.

L. Hubbard and J. Dixon, for appellees.

Howk, J.—After this cause was at issue it was tried by the court, and, at the request of the parties, the court made a special finding of facts, and stated its conclusions of law thereon, in substance, as follows:

“About the first day of November, 1882, the plaintiffs

agreed with George Kuhn to put in store with him 500 bushels of wheat in Kuhn's flouring mill at Mishawaka. It was agreed that said wheat should be stored to July 1st, 1883, that plaintiffs might sell the wheat when they pleased before that date, or that wheat would be returned if called for. George Kuhn was then operating a flouring mill, which ground, when running, about 200 bushels of wheat per day, and thereafter, until March 3d, 1883, ran about one-half of the time. At the time of the negotiation, in October or November, 1882, plaintiffs asked George Kuhn to keep their wheat in a bin by itself, and Kuhn replied that he could not agree to return them the same wheat; that he did not intend the wheat to go out of the mill. The wheat, 516 bushels, was delivered by plaintiffs to George Kuhn and piled on the floor of the mill early in November, 1882, when the mill was not running, and for that reason could not be elevated into the bins where wheat was usually kept. In the same pile on the floor was put 200 or 300 bushels bought by George Kuhn of other parties, and in a few days the mill was started and the wheat was elevated into the bins in which wheat was kept and from which the grinding was done. Of the wheat mentioned in said contract, and that piled with it, all except about 200 or 300 bushels, was put in a bin known as the smutting bin, and was all made into flour and disposed of by George Kuhn before March 3d, 1883, the remaining 200 or 300 bushels were put into another bin, known as the corner bin, and was all ground and disposed of by George Kuhn before March 3d, 1883. Said wheat was mingled with other wheat in said two bins, and all the bins in which wheat was stored ran into the bin known as the smutting bin. George Kuhn bought at least 4,000 or 5,000 bushels of wheat after this before March 3d, 1883, which went into the mill. Wheat was continually taken in, ground and sold, and on March 3d, 1883, none of the identical wheat so delivered by plaintiffs was in the mill. On March 3d, 1883, there was left in the mill about 1,900 bushels. On the 21st day of February, A.

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D. 1883, the plaintiff received from John Kuhn, a son of George Kuhn, who was then running the mill during the sickness of his father, as his agent, a writing in the words and figures following :

“ MISHAWAKA, February 21st, 1883.

“ Received of R. M. Westover (500) five hundred bushels of wheat in store to July 1st, 1883, to be disposed of at market price when he concludes to dispose of same between above date and July 1st, 1883, or wheat returned if called for.

“ GEORGE KUHN,
“ per JOHN.”

in evidence of the contract theretofore made. Sixteen bushels of the 516 were sold to George Kuhn by plaintiffs, and paid for by George Kuhn. The remaining 500 bushels mentioned in the writing were never sold by plaintiffs, nor did they receive any payment therefor.

“ On the 3d day of March, A. D. 1883, the mill stopped running and was not thereafter run until after July 3d, 1883, and between March 3d, 1883, and July 1st, 1883, the defendants, Schindler, Kamm, Yenn and Casper Kuhn, received of George Kuhn a chattel mortgage on all the wheat in the mill, and under and by virtue of said chattel mortgage took and sold all the wheat in the mill, amounting at that time to nineteen hundred bushels, receiving therefor ninety-five cents per bushel at the depot. The wheat was worth, in June and July, 1883, ninety-three cents per bushel at the mill.

“ On the last day of June, 1883, plaintiffs demanded of George Kuhn the wheat or money on his agreement, but received neither, and on the 3d day of July, A. D. 1883, they demanded of the defendants, John J. Schindler, Simon Yenn, Casper Kuhn and Adolph Kamm, that they should leave five hundred bushels of wheat for them in the mill, but said defendants refused so to do. They were then removing the wheat from the mill, and about that time they converted all the wheat and the proceeds thereof to their own use.

“ The value of the wheat when sold was ninety-three cents

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per bushel, and the value of five hundred bushels was at that time four hundred and sixty-five dollars.

"And as a conclusion of law thereon, I find that the plaintiffs are entitled to recover of the defendants, John J. Schindler, Adolph Kamm, Simon Yenn and Casper Kuhn, the sum of four hundred and sixty-five dollars.

(Signed)

"DANIEL NOYES."

"January 16th, 1884."

Over the appellants' exceptions to the conclusion of law the court rendered judgment in accordance therewith for the appellees, the plaintiffs below.

In this court the only error assigned by the appellants is that upon the facts specially found the trial court erred in its conclusion of law.

As the case is presented here the appellants admit that the facts have been fully and correctly found by the circuit court, and therefore the only question we are required to consider and decide may be thus stated: Upon the facts specially found, did the court err in its conclusion of law? This is settled by many decisions of this court. *Cruzan v. Smith*, 41 Ind. 288; *Robinson v. Snyder*, 74 Ind. 110; *Braden v. Graves*, 85 Ind. 92; *Dodge v. Pope*, 93 Ind. 480; *Fairbanks v. Meyers*, 98 Ind. 92.

Upon the facts specially found the appellees claim, and the court so decided, that the agreement or contract, under which they delivered and deposited their wheat at and in the mill of George Kuhn, was one of bailment, pure and simple. If this view of the force and legal effect of such agreement or contract be the correct one, it would seem that the court did not err in its conclusion of law, and that the judgment ought to be affirmed.

But, on the other hand, the appellants insist that such agreement or contract is not one of bailment, but is a *mutuum* or exchange or sale of the wheat, under which the title thereto passed at once to the depositary, George Kuhn, and he became the appellees' debtor for the value of the wheat. If this

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view of the case be correct, of course the court erred in its conclusion of law, and the judgment should be reversed.

The question is a close one, and much can be said, indeed, much has been said by the learned counsel of both the appellees and the appellants in their able and exhaustive briefs of this cause, in support of their respective positions. The views of both parties, antagonistic and irreconcilable as they are, are not unsupported by authority. A careful consideration of the facts found by the court in the case in hand has led us to the conclusion, though with some degree of hesitancy, that the contract or agreement, under which the appellees deposited their wheat in the mill of George Kuhn, was a contract of bailment. Upon the facts specially found there was not, and could not have been, a *mutuum* or exchange, or sale of the wheat; for the court found that the wheat was put in store with George Kuhn in his flouring-mill, about the 1st day of November, 1882, under the following verbal agreement, then made: "It was agreed that the wheat should be stored to July 1st, 1883; that the plaintiffs might sell the wheat when they pleased before that date, or that wheat would be returned if called for." The court also found that, on the 21st day of February, 1883, the contract or agreement theretofore made was reduced to writing, in the form of a receipt executed to the appellees for the wheat, in the name of George Kuhn, by his son, a copy of which writing is heretofore given in this opinion. It will be observed that there is no substantial or material difference between the terms of the verbal agreement and those of the written contract. It is manifest from the express terms of the contract or agreement, verbal or written, that the appellees did not sell their wheat, and the title thereto did not pass, to the depositary, George Kuhn; for it was plainly stipulated that the appellees might sell the wheat when they chose, before July 1st, 1883, or wheat would be returned to them, if called for.

We are of opinion that the contract or agreement, verbal or written, between the appellees and the depositary, Kuhn,

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was a contract of bailment. In *Ledyard v. Hibbard*, 48 Mich. 421 (42 Am. R. 474), a firm of merchant millers received wheat from farmers and stored it in the mill elevators, giving receipts for it in the following form :

“GRAND RAPIDS, MICH., March 26, 1878.

“Received of William B. Ledyard by L. Byrne 820 bushels number One wheat at owner's risk from elements, at 10 cents less Detroit quotations for same grade when sold to us. Stored for — days.”

• (Signed) “HIBBARD & GRAFF.”

Nothing was charged for storage, but the millers used the wheat as they needed it in their manufacture of flour, and its identity was constantly changing in the elevators. It was held by the Supreme Court of Michigan, that in the absence of local usage to the contrary, or of a course of dealing between the parties by which a different effect should be given them, the receipts should be construed as evidence of a bailment, instead of a sale. Speaking for the court, COOLEY, J., said :

“The fact that the receiptors for the wheat transacted business in the two capacities of warehousemen and millers, would not be of importance, and certainly could not affect the construction of their business contracts. If as warehousemen they gave warehouse receipts for grain received in store, the receipts must be construed by their terms and by commercial usage ; in commercial circles they would be understood to represent the title to the quantity of grain specified ; and though the quantity in store might fluctuate from day to day as grain would be received and delivered out, this would not affect the title of the holder of receipts, who would be at liberty to demand and receive his proper quantity at any time, if so much remained in store. But if the quantity in store is reduced by consumption, instead of by shipment or sale, it is not apparent that the rights of the holder of the receipts should be any different.”

The principal difference between the case last cited, and
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from which we have so liberally quoted, and the case in hand, is that the former case was an action of replevin brought, and successfully maintained, by the depositor of the wheat against the depositary for the same quantity of wheat, although the identical wheat deposited had been probably consumed by the depositary in the manufacture of flour; while, in this case, the depositor has sued the assignees or mortgagees of the depositary for the wrongful conversion of his wheat. This difference is not a material one, we think, upon the facts specially found by the court in this case. For the court specially found, that on the last day of June, 1883, and within the time specified in the contract, the appellees demanded of the depositary, George Kuhn, the return of the wheat or the money therefor, and received neither. There was then wheat in the mill of George Kuhn, more than sufficient to have enabled him to comply with appellees' demand, in accordance with their contract, upon which wheat, however, the said George Kuhn had theretofore executed a chattel mortgage to the appellants. It was further found by the court, that on the 3d day of July, 1883, the appellees demanded of the appellants, when the latter were engaged in the removal of the wheat from George Kuhn's mill, that they should leave five hundred bushels of wheat in the mill for the appellees; but this the appellants refused to do, "and, about that time, they converted all the wheat and the proceeds thereof to their own use."

Now it is absolutely certain, we think, that under the contract or agreement, verbal or written, of George Kuhn with the appellees, their title to five hundred bushels of wheat in the mill was superior, both in law and equity, to any claim thereon of George Kuhn, the depositary, although the identical wheat, stored or deposited in the mill by appellees, might have been previously consumed by him in the manufacture of flour. This is the logical and legal effect of the agreement or contract, verbal or written, between George Kuhn and the appellees; whenever, prior to July 1st, 1883, the ap-

pellees demanded of George Kuhn the return to them of the five hundred bushels of wheat (so much being then in store), their title thereto was absolute and perfect as against Kuhn, or those claiming under him. If such return were refused, they could maintain replevin for the possession of the wheat, or if, after the demand for the return of the wheat, the parties in possession should convert the same to their own use, the appellees could maintain an action for the recovery of damages, for such wrongful conversion of the wheat. This latter case is the case at bar.

In *Sexton v. Graham*, 53 Iowa, 181, a case similar in some of its features to the case under consideration, it was held by the Supreme Court of Iowa that where grain was delivered to a warehouseman and a receipt taken, which provided that the grain might be stored in a common mass with other grain of the same quality, the contract was one of bailment and not of sale, although the warehouseman was himself continually buying and adding grain on his own account to the common mass, and shipping away therefrom.

Upon the facts specially found by the court, the appellants could not and did not, by virtue of their chattel mortgage, acquire any better title to the wheat mortgaged than the mortgagor George Kuhn had thereto at the time the return thereof was demanded by the appellees. If the return of the wheat had been demanded of and refused by George Kuhn, at or before the time he mortgaged the same to the appellants, and when he had 1,900 bushels of wheat in his mill, it can not be doubted, we think, that the appellees might have maintained an action against him for the recovery of their wheat in quantity, whether the identical wheat deposited by them remained in his mill or not. They and he became and were tenants in common of the 1,900 bushels of wheat then in his mill; they to the extent of their 500 bushels and he to the residue. He could not sell nor mortgage their quantity of the wheat to the appellants, so as to divest the appellees' title thereto, or to authorize its removal from the mill, after

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their demand that it should be left there by such mortgagees. When, after such demand, the appellants removed the wheat from the mill and converted the same to their own use, as the court found the facts to be, they became and were liable in damages to the appellees, as the owners of the 500 bushels of wheat so converted, for the fair value thereof. 2 Kent Com. 364, 365; *Cushing v. Breed*, 14 Allen (Mass.) 376; *Young v. Miles*, 20 Wis. 615; *Young v. Miles*, 23 Wis. 643; *Pribble v. Kent*, 10 Ind. 325; *Rice v. Nixon*, 97 Ind. 97; *Bottenberg v. Nixon*, 97 Ind. 106.

We are of opinion, therefore, that upon the facts specially found, the trial court did not err in its conclusion of law.

The judgment is affirmed, with costs.

Filed Dec. 30, 1884.

No. 11,008.

VANGORDER ET AL. v. SMITH.

REPLEVIN.—*Parties.*—*Pleading.*—In replevin parties can not, with any propriety, be made defendants merely because they claim "some interest" in the property in controversy, but have none, and a general denial by such defendants makes no issue to try.

WILL.—*Personal Property.*—*Construction.*—*Precatory Words.*—*Trust and Trustee.*—A bequest of personal property to the testator's wife, with power to use and control it as long as she may live, and at her death to dispose of it by will or otherwise, "if she be then my widow," with precatory words of recommendation, suggestion or desire as to sales, investment of proceeds and use of income therefrom in the care and education of children, and in advancing portions to them, as their habits and conduct may, in her judgment, be deemed proper, is a bequest to her of the property absolutely, subject to no trust whatever.

From the Pulaski Circuit Court.

W. Spangler and G. Burson, for appellants.

S. T. McConnell, R. Magee and D. B. McConnell, for appellee.

MITCHELL, J.—For the purpose of introducing the ques-

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tion involved in this record in its general aspect, it is sufficient to state that William S. Huddleston, by his last will and testament, after making certain devises and bequests, not in any manner involved in this controversy, made the following provision for his widow, viz.: "I will and bequeath to my wife all and singular my other property, both real and personal, of every kind and description whatever, to be held, used and controlled by her as long as she may live, and to be disposed of by her by will or otherwise at her death, if she be then my widow, and I would recommend and suggest that she sell and dispose of the residue of my lands not herein specifically bequeathed, except the home property, that is, the house and lots whereon we now live, and I hereby authorize her to sign such deeds and conveyances, and to execute such releases as may be necessary to carry the provisions of this bequest into effect, and to convey good and perfect titles thereto, and that she make such sales as soon as convenient, and that she sell at public auction all the personal property on my farms except such as she shall elect to keep for her own use, and that she convert all the other of my property into cash as soon as it can be done without loss, except such as she may desire to retain for her own use, and that she invest the proceeds thereof, together with the proceeds arising from the sale of the lands, in United States Government bonds. * * * * *

"It is my desire, also, that my wife, with the revenue she will derive from the rents and profits of my said estate, and the interest she will receive on the moneys invested in registered government bonds, will provide and keep a good and comfortable home for my two sons and herself, and that she will use every endeavor to give them a good education, and that she will make their diligence, industry, economy and duty to her her guide, as to when she will allow them to take charge of the estate herein bequeathed to them, and she may, from time to time, as she may deem proper and just, divide and apportion the property herein bequeathed to her, among

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my children, after first becoming satisfied that such property, when so given to them, will not be uselessly squandered and wasted."

The testator died, leaving his widow Julia A. Huddleston, now Julia A. Smith, William S. Huddleston and Louis Huddleston, his two sons, and Eulalee VanGorder, his only heirs at law.

The will was duly admitted to probate, and one Joseph B. Agnew was duly appointed administrator of the estate. Following the recommendation and desire of the testator as expressed in his will, it appears from the record that the widow converted the personal property, or a portion of it, into money, and through the agency of a friend, with this money, purchased two United States Government bonds, of the denomination of \$1,000 each, and also about \$10,000 in value of the bonds of Pulaski county.

These securities were without her consent delivered by her agent to Mr. Agnew, the administrator, who, acting under the belief that he was entitled to hold them as part of the assets of the estate, refused to surrender them to the widow, who had then, by a subsequent marriage, become Julia A. Smith.

For the purpose of securing possession of these bonds, she instituted a suit in replevin against the administrator, her complaint being in the usual form, for the recovery of personal property wrongfully detained, except that these appellants were made parties without alleging that they, or either of them had or claimed the actual or constructive possession of the property described.

The only averment in the complaint relating to them, and the only issue tendered them was the following: "Plaintiff also avers that Eulalee VanGorder, who is a married woman, and George L. VanGorder, her husband, William Huddleston, who is a minor, and Louis Huddleston, who is likewise under twenty-one years of age, each claims some interest in the property described in the plaintiff's complaint, and hence are made parties to this action, that they may disclose such

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interest if any they have. But the plaintiff avers the truth to be, that neither of the VanGorders, nor of the said Huddlestons, has any interest whatever in the said property."

Without raising any objection to this complaint, the appellants answered by a general denial. The administrator in like manner took issue by filing a separate answer in denial, and upon the issues thus made a trial was had by the court, which resulted in a finding and judgment for the appellee against all the defendants below, adjudging her the absolute owner and entitled to the possession of the property in question.

The appellants prosecute this appeal, and the only error insisted on in the argument is, that the court erred in overruling their motion for a new trial.

The administrator, apparently content with the result of the litigation below, made no motion for a new trial, and is not a party to this appeal.

The judgment of the circuit court might well be affirmed upon the ground that upon the issue tendered to the appellants in the complaint, and her denial contained in the answer, there was really nothing in controversy to try.

The averment in the complaint, that the appellants "claim some interest in the property described in the plaintiff's complaint," and the further statement that neither of them "had any interest whatever in said property," and the answer denying those averments, without more, presented, in our opinion, no issue for trial.

The court might well have treated the answer as a disclaimer of any interest in the subject-matter in controversy, and given judgment for the appellants for their costs. Indeed, it is not perceived how the appellants could, with any propriety, be made parties to the action, which was purely an action at law to recover personal property from Agnew, without averring that they had or claimed to have possession of the property in controversy.

Replevin is essentially a possessory action and does not lie against one who is not, either actually or constructively, in

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possession of the property described in the complaint. Wells Replevin, section 134; *Baer v. Martin*, 2 Ind. 229.

No objection was made to the complaint, however, and under the answer already alluded to the case was tried, and judgment given against the appellants, as before stated.

Wells on Replevin, in section 634, says: "There appears to be no authority for allowing a stranger who claims an interest in the property to come in and be made a party, and have his rights litigated, though such course would not violate any principle of the law." Adopting this suggestion, where it is done by consent of the court and without objection from either party, as appears to have been done in the case exhibited in this record, we have concluded, after some hesitation, that the interests of all concerned would be better subserved by examining and deciding the principal question involved, which has been elaborately argued by counsel on both sides in their briefs.

Under any view which can be taken of the case, the appellants are not now, as a matter of course, entitled to the possession of the property here in controversy. We do not understand this to be claimed by their counsel, but it is contended that the will creates a trust, of which they are the ultimate beneficiaries, and that inasmuch as the court below adjudged the appellee to be the owner of the property absolutely, its judgment should be reversed.

These bonds were purchased with moneys derived from the sale of personal property bequeathed to the appellee, under the clause of the will above recited. The quantity of her estate in this property, her right to its possession, as well as the interest, if any, of the appellants therein, depend solely upon the construction to be given to that clause of the will.

The question involved is not entirely free from difficulty, owing, chiefly, to the infinite number of cases—not altogether in harmony with each other—in which provisions in wills, somewhat analogous to each other, and bearing a close resemblance in many respects to the one under consideration,

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and yet containing shades of difference, have been construed by the courts.

Nothing is more thoroughly settled than that in giving an interpretation to a will, the intention of the testator is to be discovered and given effect to, if possible; but this familiar rule is, nevertheless, subject to the qualification, that in order that effect may be given to the testator's intentions, when discovered, it must have been expressed in conformity to the rules for the regulation of the practical affairs of life, and to the laws by which rights of property are secured and established.

If, for example, it should appear from one aspect of the will under consideration, that it was the intention of the testator to vest in his widow an interest in the personal property bequeathed to her during her lifetime only; while, in another aspect of the same clause, the intention of the testator to give her full and complete dominion over the property, including the power to dispose of it, and appropriate the proceeds at her own pleasure, is as clearly indicated, then it is not perceived how these intentions can be consistent with each other. If they are inconsistent, when measured by the established rules of law, then one or the other must yield. Upon no principle of reason can the conclusion be reached that the testator intended that his widow should be the trustee of his personal estate during her lifetime, for the benefit of his children, while at the same time she should be vested with such an unqualified right in, and dominion over it, as in legal effect made her the absolute owner; and if by the language employed in the will, all the rights and incidents of ownership were without limitation or restriction communicated to her, then the law draws the conclusion that it was his intention to make her the owner. Authority to dispose of property at discretion, there being no bequest over, is taken as evidence of the extent of the interest intended to be given, and is construed to be an absolute interest, and not a mere power to sell. *Kendall v. Kendall*, 36 N. J. Eq. 91. Absolute power of disposition and absolute ownership are, and must be, in the nature

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of things, inseparably connected, and he to whom is given the one thereby acquires the other, by irresistible implication, unless this implication is negated by the terms of the gift.

We state it as our conclusion upon the authorities cited, that when a bequest of personal property is made for life, "with a full power of disposition, by will or otherwise, at the pleasure of the devisee, without limitation or restriction as to the time, mode or purposes of the execution of the power," the life-estate is controlled by the unlimited power of disposition, and an absolute estate in the property is thereby created in the legatees. *Dodge v. Moore*, 100 Mass. 335; *Hale v. Marsh*, 100 Mass. 468; *Cummings v. Shaw*, 108 Mass. 159; *Ramsdell v. Ramsdell*, 21 Maine, 288; *Diehl's Appeal*, 36 Pa. St. 120; *Kinter v. Jenks*, 43 Pa. St. 445; *Dunlap v. Garlington*, 17 S. C. 567.

In a note appended to the case of *Irwin v. Farrer*, 19 Vesey, 86, which case holds the rule substantially as above stated, Mr. Sumner says: "Where the first taker under a will has the power of spending the fund bequeathed in his lifetime, * * * there is, obviously, no ascertained part upon which a trust can attach, and the first taker has, virtually, the whole property in, and dominion over, the fund."

Without intending to announce a rule one way or the other in like cases involving real estate, we limit the statement of the conclusion reached to personal property, for the reason that personal property alone is involved in this case, and we have no purpose to state a conclusion more broadly than the case requires.

As applicable to real estate, the conclusions here stated might seem to conflict with *Dunning v. Vandusen*, 47 Ind. 423 (17 Am. R. 709), and *John v. Bradbury*, 97 Ind. 263. Of the case in 47 Ind., *supra*, it may be said that it was found necessary to limit it in some respects in *South v. South*, 91 Ind. 221 (46 Am. R. 591); *Clark v. Middlesworth*, 82 Ind. 240; *Downie v. Buennagel*, 94 Ind. 228. And of the later case, it may be distinguished from the one under consideration

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in two particulars: First, by the fact that the property involved was land; and, Second, by the further fact that there was, by the terms of the will, a remainder over of the property left undisposed of to the children of the testator.

Applying the principles above stated to the will in hand, what result follows? Leaving out of view what is said concerning the real estate, the will first bequeathes to the testator's wife all his personal property, "of every kind and description whatever, to be held, used and controlled by her as long as she may live, and to be disposed of by her, by will or otherwise, at her death, if she be then my widow."

All that need be said of the power of disposition of the wife being made contingent upon her remaining unmarried is, that it is void as being in restraint of marriage. R. S. 1881, section 2567; *Coon v. Bean*, 69 Ind. 474; *Stilwell v. Knapper*, 69 Ind. 558 (35 Am. R. 240); *Crawford v. Thompson*, 91 Ind. 266 (46 Am. R. 598). Eliminating this condition, we find that notwithstanding the limitation of her right in the property to a life-estate, there is here an unconditional power to dispose of the property "by will or otherwise," and unless the subsequent parts of the will restrain or control this unlimited power within the rule above stated, the conclusion must follow that the widow took an absolute title to the property.

Continuing, the will contains the following precatory words, which we apply to the personal property: "And I would recommend and suggest * * * * * that she sell at public auction all the personal property on my farms except such as she may elect to keep for her own use, * * * * and that she invest the proceeds thereof * * * in United States Government bonds. * * * * It is my desire that my wife, with * * * the interest she shall receive on the moneys invested in registered government bonds, will provide and keep a good comfortable home for my two sons and herself, and that she will use every endeavor to give them a good education, * * * * and she may, from time to time,

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as she may deem proper and just, divide and apportion the property herein bequeathed to her among my children, after first becoming satisfied that such property, when so given to them, will not be uselessly squandered and wasted."

These subsequent provisions of the will, expressed by way of "recommendation," "suggestion" and "desire," we construe as rather enlarging than restraining the power of disposition. While it was the manifestation of unbounded confidence in the prudence, discretion and maternal affection of his wife, it was in no sense the creation of a trust, nor a limitation upon her power to dispose of the property "by will or otherwise" at her pleasure. This confidence may or may not have been abused by the widow, but, having ascertained that it was reposed in her by the testator, the abuse of it affords no ground for the court to give a different construction to the will on that account.

While it is true that he expressed a *desire* that she should, out of the interest accruing from the government bonds, provide a comfortable home for herself and the two sons, and give them a good education, he also confided to her the discretion to divide and apportion to them, from time to time, as she might see fit, the property "herein bequeathed to her," enjoining upon her only to first become satisfied that their habits and disposition were such as to insure a provident use of it.

If this was a trust, it was one which can be enforced against her by a court of equity, but we can not conceive how a court could compel her to hold, for the benefit of the appellants, that which the will gave her the power to dispose of by will or otherwise as she pleased, and which she was recommended to withhold from them until in her judgment they would use discreetly.

Where a bequest is given, coupled with precatory words which leave the legatee free to act or not to act, such words are to be treated as an appeal to the conscience and affections of the legatee and nothing more.

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The appellants' counsel press upon our consideration some decisions from other courts, which in many respects bear some analogy to this, in which a different conclusion was reached, but without taking the time to do so, a clear distinction might be shown between those cases and this one.

Without extending this opinion further, our conclusion is that by his will the absolute ownership of the personal property of William S. Huddleston was vested in the widow, and that the precatory words in the will were nothing more than recommendations that she should use and dispose of it discreetly, as her judgment might dictate, for her own and the benefit of the two sons, and did not create a trust.

The judgment is affirmed, with costs.

Filed Jan. 9, 1885.

No. 11,491.

STORY v. THE STATE.

CRIMINAL LAW.—Homicide.—Exhibiting Clothing Worn by Deceased to Jury.

Evidence.—Upon the trial of a person accused of homicide, the clothing worn by the deceased at the time he was killed may be exhibited to the jury as evidence. MITCHELL, J., dissents.

SAME.—Province of Jury.—Inferences.—In such case it is the province of the jury to determine what inferences are to be drawn from the condition and appearance of the clothing, in connection with the other evidence, and it is not error to refuse to give an instruction which denies this right.

SAME.—Instructions.—Supreme Court.—The rule that the instructions in a case are all to be taken together, and that if they thus present the law correctly and without material contradiction, they will be sustained by the Supreme Court, applies as well to criminal prosecutions as to civil actions.

SAME.—Self-Defence.—One who takes another's life must be "himself without fault," to justify his acquittal on the ground of self-defence, and it is proper for the trial court to so instruct the jury.

SAME.—Retreating.—Where both parties are in the wrong, neither can justify the taking of life without retreating.

SAME.—Instruction.—It is not error in such case to instruct the jury that if a person voluntarily and unlawfully enters into a mutual combat, or pro-

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vokes a conflict by his own wrongful act, he has no right to take his adversary's life; yet, if he withdraws from it in good faith, and is then pursued, he may then exercise his right of self-defence, but that in such case it must appear, in order to establish excusable homicide in self-defence, that the party had retreated as far as the fierceness of the assault would permit.

From the Henry Circuit Court.

C. G. Offutt, G. H. Punttenney, A. B. Irvin, J. Brown and W. A. Brown, for appellant.

F. T. Hord, Attorney General, *G. W. Duncan*, Prosecuting Attorney, and *W. B. Hord*, for the State.

ELLIOTT, J.—The appellant has been twice found guilty of manslaughter, the first verdict was rendered in the Rush Circuit Court, the second in the Henry Circuit Court, where the case had been sent upon the application of the appellant for a change of venue.

The court permitted the clothing worn by the deceased at the time of the rencounter, which resulted in his death, to be exhibited to the jury. There was no error in this ruling. Marks upon clothing may afford evidence of the character of the wounds and the manner in which they were inflicted, and, in some cases, as where the pockets are cut or turned out, may supply evidence of the motive which prompted the homicide. Best Prin. Ev. (Am. ed.) 198, auth. n.; Burrill Cir. Ev. 261, 686; Wharton Crim. Ev. (9th ed.), sections 312, 767; *McDonel v. State*, 90 Ind. 320, see p. 328; *Short v. State*, 63 Ind. 376; *Beavers v. State*, 58 Ind. 530.

It is settled by our decisions that instructions are not to be disposed of by dissecting them and assailing them in detail, but that all are to be taken together, and if, when thus taken, they present the law correctly, and without material contradiction, they will be sustained by this court. *Goodwin v. State*, 96 Ind. 550; *McDermott v. State*, 89 Ind. 187; *Achey v. State*, 64 Ind. 56; *Binns v. State*, 66 Ind. 428. This rule applies as well to criminal prosecutions as to civil actions.

It is established law that the man who takes another's life

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must be himself without fault, or he can not go acquit upon the ground of self-defence. The authorities qualify the statement of the right of defence with the phrase "one who is himself without fault," and it is proper for the trial court to put into its instructions that phrase, or one of equivalent meaning. *McDermott v. State*, *supra*; *Presser v. State*, 77 Ind. 274; *Runyan v. State*, 57 Ind. 80 (26 Am. R. 52); *Wall v. State*, 51 Ind. 453; *Kingen v. State*, 45 Ind. 518; *State v. Hays*, 23 Mo. 287; *Horrigan & Thompson Cases Self-Defence*, 492; 1 Bishop Cr. L., sec. 865.

Where both parties are in the wrong, neither can justify the taking of life without retreating. Mr. Bishop thus states the law: "The cases in which this doctrine of retreating to the wall is commonly invoked, are those of mutual combat. Both parties being in the wrong, neither can right himself except by 'retreating to the wall.' When one, contrary to his original expectation, finds himself so hotly pressed as to render the killing of the other necessary to save his own life, he is guilty of a felonious homicide if he kills him, unless he first actually puts into exercise this duty of withdrawing from the place." 1 Bishop Crim. L., section 870. The instructions, taken as a whole, are quite as favorable to the appellant as he had a right to ask, for they state the law stronger in his favor than the author we have quoted, and many authorities support Mr. Bishop's statement.

If we should single out and consider apart from the other instructions the one objected to we could not reverse. That instruction, after stating in general and accurate terms the rule in cases of self-defence, proceeds thus: "If a person voluntarily and unlawfully enters into a mutual combat, or brings on and provokes a conflict by his own wrongful act, he has no right to take his adversary's life; but though he may have thus provoked the conflict, or voluntarily entered into it, yet, if he withdraws from it in good faith, and is then pursued, he may then exercise his right of self-defence; but in such a case it must appear, in order to establish excusable

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homicide in self-defence, that the party had retreated as far as the fierceness of the assault would permit him." We think this was not an incorrect statement of the general rule, at least not one of which the appellant can complain, and under the evidence was as favorable to him as he had any right to expect. The authorities go very far toward holding that there must always be a withdrawal from the conflict, or an attempt at least to withdraw, before the right to take life can arise. *Com. v. Riley*, Horr. & Th. 155; *State v. Hill*, *Ib.* 199; *Stoffer v. State*, *Ib.* 213; *Hittner v. State*, *Ib.* 236.

The fifth instruction asked by the defendant reads thus: "The jury can not draw any conclusion from their inspection of the pantaloons pockets of the deceased, that the defendant committed any robbery on the deceased, or that he took any money therefrom, or that he at any time placed his hand or fingers in said pockets, notwithstanding such pockets, when exhibited to the jury, may have been turned wrong-side out and blood stains may have existed thereon in the shape of finger marks." There was no error in refusing to give this instruction. The jury, as we have seen, had a right to inspect the clothing worn by the deceased at the time he was killed, and it was their province to determine what inferences were to be drawn from its condition and appearance. There was evidence showing that the appellant was shot in the right hand, and a legitimate inference from this might well have been that his were the fingers that made the bloody marks upon the pockets of the deceased. It would have been an unjustifiable usurpation for the court to deny the triors of the facts the right to make legitimate inferences from the clothing placed before them for inspection.

There is evidence fully sustaining the verdict, and we will not disturb it. Judgment affirmed.

MITCHELL, J., dissents from so much of the foregoing opinion as holds that it was proper to exhibit in evidence the clothing of the deceased.

Filed Jan. 10, 1885.

Bradley v. City of Frankfort.

No. 11,793.

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CITY.—Opening Streets.—Commissioners.—A person who is financially interested in the opening of a street, or who is father-in-law to a person whose property will be affected by such opening, is incompetent to act as a commissioner, in the assessment of benefits and damages.

SAME.—Objections to Commissioners.—Waiver.—If a person is served with notice of the second meeting of the commissioners, and before an assessment against his property, has knowledge of the incompetency of any commissioner, he must make the objection then and there. If he does not, he will be deemed to have waived it.

SAME.—Objections on Appeal to Circuit Court.—If his objection is overruled, or not reported to the common council, or disregarded by the common council, it may be renewed, and tried on appeal in the circuit court.

SAME.—Regularity of the Appointment of Commissioners, etc.—No question can be made in the circuit court, as to the regularity of the appointment of commissioners, except by a verified answer.

From the Clinton Circuit Court.

J. V. Kent, for appellant.

A. E. Paige and *S. O. Bayless*, for appellee.

ZOLLARS, C. J.—From the proceedings of the common council of the city of Frankfort and the “city commissioners,” under section 3166, *et seq.*, R. S. 1881, in the extension and opening of a street, and the assessment of damages and benefits, appellant, to whose real estate benefits were assessed, appealed to Clinton Circuit Court.

In that court he filed his objections to the proceedings of the common council and commissioners, as he had a right to do under section 3180, R. S. 1881. A demurrer was sustained to the fifth and sixth grounds of his objections. Appellant has assigned that ruling as error, and seeks by argument to make good that assignment.

The substance of the fifth ground of objection is that one of the “city commissioners,” who assisted in assessing benefits to appellant’s property, was disqualified and incompetent to act, for the reason that he was financially interested in the

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133	95

99	417
148	333
149	186

99	417
165	555

99	417
167	380

99	417
170	112

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opening of the street, as he owned property upon the street which will be benefited by the opening, if by such opening benefits will accrue to any property, and that on account of such interest he was unduly biased, prejudiced and influenced to assess benefits to appellant's property.

The substance of the sixth ground of objection is that another of the city commissioners was disqualified and incompetent to act, because he is the father-in-law of one Bryant, who owned property upon the street, which would be benefited, if by such opening benefits would accrue to any property. The statute provides that once in each year the circuit court in the county wherein cities are situated, shall appoint five freeholders, residents of the city, to act as "city commissioners" in the opening of streets, etc. Section 3166, R. S. 1881.

It is provided in section 3167, that in case any commissioner shall be interested, he shall be incompetent; and in case a number are interested, so great as not to leave a majority competent, the common council may appoint commissioners *pro tempore*. Under the statute and our decisions, these causes clearly show the two commissioners named to have been incompetent.

The eleventh subdivision of section 240, R. S. 1881, which has been in force since 1852, ~~2~~ R. S. 1876, p. 316, provides that "When a person is required to be disinterested or indifferent in acting on any question or matter affecting other parties, consanguinity or affinity within the sixth degree, inclusive, by the civil law rules, or within the degree of second cousin, inclusive, shall be deemed to disqualify such person from acting, except by consent of parties."

Under this statute it was held in the case of *High v. Big Creek Ditching Ass'n*, 44 Ind. 356, that an appraiser appointed to appraise the benefits and damages to accrue to land-owners along the line of a ditch, whose sister-in-law, niece and nephew own land along the line of the ditch, is not a disinterested party, and is disqualified from acting. See,

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also, cases therein cited; also, *Hudspeth v. Herston*, 64 Ind. 133; *Mills Em. Dom.*, section 227; *Clifford v. York Co. Comm'rs*, 59 Maine, 262; *State v. Delesdernier*, 11 Maine, 473; *State v. Crane*, 36 N. J. L. 394; *Friend, Appellant*, 53 Me. 387; *Rock Island, etc., R. R. Co. v. Lynch*, 23 Ill. 597; *State v. Jersey City*, 25 N. J. L. 309. That all parties whose lands are to be assessed, or who are in any way to be affected by the proceedings, have the right to demand that the commissioners shall be impartial, is apparent to any one. The above adjudications are all upon statutes with provisions similar to the statute under consideration, as to the qualifications of appraisers and commissioners, and hence are authority here.

This position does not seem to be controverted by counsel for appellee, but their contention is that the question can not be made as attempted by appellant in the fifth and sixth grounds of objections to the proceedings, as filed in circuit court. They say:

"We submit to this court that the court below committed no error in sustaining the demurrers to these 'grounds of objection,' for the following reasons, to wit:

"1st. For the reason that they seek to raise a question of which the city commissioners have *exclusive jurisdiction*.

"2d. For the reason that they seek to raise a question prohibited by the statute.

"3d. For the reason that the appellant waived his right to file the objections in the court below on account of having failed to present the same before the commissioners and council, as provided in section 3167, R. S. 1881."

Section 3180 does provide that the question as to whether proper assessments were made in favor of, or against, persons, other than the appealing party, shall not be tried on appeal to the circuit court; but, clearly, under this section, the appellant may put in issue and have tried the question as to whether or not too much is assessed against him, or as to whether or not he should have been assessed at all. The section clearly implies this. And for the purpose of showing

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that one of the commissioners is disqualified because interested, it may be shown that he is the owner of property upon the line of the street in as close proximity as that of the appellant, and that because of such proximity and liability to assessment for benefits, the commissioner is financially interested.

Especially should this be so, when, as in this case, it is alleged, that by reason of these facts he was prejudiced, biased and influenced in assessing greater benefits to the property of the appellant. Mills Em. Dom., section 234. As to whether or not appellant waived his objection to the competency of the two commissioners is a more serious question.

Section 3167 of the act provides that any person interested in the proceedings, or whose property is affected, may present his objections, and if the commissioners be found interested, commissioners *pro tempore* may be appointed by the common council.

Section 3168 provides for two meetings of the commissioners. At the first they determine simply the property that will be affected in the way of benefits and damages. No notice of this meeting is required to be given to property-owners. It is provided, however, by the same section, that with the report of the proceedings and result of this meeting, the commissioners shall file a notice of the time and place, when and where, they will meet to determine the question of benefits and damages to real estate. Upon this being done, the city clerk must issue like notices, which must be served upon the owners of property named in the report. These notices must state generally the character of the proposed improvement, etc., but need not describe the property to be affected.

At the second meeting the commissioners may subpoena witnesses and hear testimony bearing upon questions to be then determined by "all matters concerning the laying out of the street," etc. Sections 3169 and 3170.

Appellees contend that the appellant should have made his objections to the commissioners at this meeting, and that be-

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cause he did not he waived his objections. The general rule is that such objections must be made at the earliest opportunity, so that the proceedings shall not be allowed to proceed to a fruitless result, with the accumulation of large cost, and that if not so made, they will be deemed to be waived. *Mills Em. Dom.*, section 251; *Fowler v. County Comm'rs*, 6 Allen, 92; *Mansfield, etc., R. R. Co. v. Clark*, 23 Mich. 519; *Readington v. Dilley*, 24 N. J. L. 209; *Commissioners' Court v. Bowie*, 34 Ala. 461; *People v. Taylor*, 34 Barb. 481. Hence, we have held in highway cases, that objections not made before the board of county commissioners, when there is an opportunity to make them, shall be taken as waived, and can not be made on appeal. *Green v. Elliott*, 86 Ind. 53; *Peed v. Brenneman*, 89 Ind. 252; *Lowe v. Ryan*, 94 Ind. 450.

This rule of practice, however, does not apply where no such opportunity is afforded. *Breitweiser v. Fuhrman*, 88 Ind. 28; *Fleming v. Hight*, 95 Ind. 78.

It will be observed that under section 3167, *supra*, upon objection being made to the competency of commissioners, the common council are to appoint commissioners *pro tempore*, if those objected to are found to be incompetent.

As to when and how such objection is to be made is not definitely stated in this section, nor in any other section of the statute. As there is no provision made for notice to property owners of the appointment of the commissioners by the court or common council, or of the first meeting of the commissioners, clearly, such property owners are not called upon to make such objections prior to the report of the determination of the commissioners at the first meeting. This is further apparent from the fact that the objections are to be made by persons whose "property is affected." It can not be known whose property is affected in the sense of the statute, until after the commissioners shall have reported upon that subject.

It is provided in the latter portion of section 3180 that on appeal to the circuit court no question shall be tried concerning the regularity of the appointment of the commissioners,

their qualifications or competency, unless the appellant, by answer duly verified, shall put such matters in issue. This, clearly, by implication, authorizes such objection upon appeal. Are the objections, then, to be made only in the circuit court, or may they also be made at the second meeting of the commissioners? If they may be made at either time and place, may the objecting party exercise his option as to time and place?

When persons are served with notice of the second meeting of the commissioners they are called upon to appear before them and protect their rights. If the notice does not serve this purpose, and carry with it the right and duty to thus appear, it serves no purpose at all, and had as well not be given. The commissioners thus assembled at the second meeting are there, in a sense, as the triers of the fact as to whether or not the lands of the persons named in the first report will be benefited or damaged by the proposed opening of the street, etc. These persons are entitled to competent and impartial triers, and if they think that the commissioners are not competent and impartial, they clearly have the right to object to them before they proceed to make the assessments. Having the right, they ought to exercise it, and thus prevent a useless proceeding and the accumulation of useless costs.

We think that a proper construction to give to these various sections of the statute is, that if a person is served with notice of the second meeting of the commissioners, and, before the making of assessments against his land, has knowledge that any of the commissioners, on account of their interest, are incompetent, he should make the objection before the assessments are made, and that if he does not make the objection then and there, he must be deemed to have waived it, and can not make it on appeal. Section 3180 gives the right to try this question on appeal, but it does not follow from this, that it may, or must in all cases, be first made there, or that it may not be waived by a failure to make it as above stated.

If his objection before the commissioners is overruled, or

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is disregarded and not reported to the common council, or if the common council disregard it, it may be renewed and tried on appeal; or if a party has had no knowledge of such incompetency before the making of the assessments, and has no opportunity to make the objection, under the above section 3180, he may make it in the circuit court on appeal.

It is stated in fifth ground of objection, *supra*, that appellant did not know that the common council intended to appoint Clark as a commissioner, until long after the appointment was made.

In the sixth ground of objection, *supra*, it is stated that appellant had no notice that the city commissioners would assess benefits to his property, until long after Gester was appointed a commissioner by the common council, and was not present when the appointment was made.

It will be observed that there is no averment here that appellant had no knowledge of the incompetency of these commissioners before or at the time of the second meeting of the commissioners. There is no averment at all as to knowledge, or want of knowledge, of such incompetency. The theory of these grounds of objection seems to be that objections to the commissioners appointed by the common council must have been made at the time of their appointment, and could not be made afterwards. Under the construction we have given the statute, this theory is not tenable.

As appellant was served with notice of the second meeting of the commissioners, he could and should have made his objections then and there, if, at that time, he had knowledge of any incompetency. If he had not, he should have averred that fact in the above grounds of objection, and thus put himself in a position to make the objection in the circuit court. Not having done this, the above grounds of objection were insufficient as an answer to the transcript of the proceedings, which, under section 3180, *supra*, is considered as the complaint, and there was, therefore, no error in sustaining the demurrer to them.

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The two commissioners above named, with one other, were appointed by the common council. Appellant seeks to make the question in argument that they were not regularly appointed. Section 3180, *supra*, provides, as we have seen, that no question shall be tried on appeal concerning the regularity of the appointment of the commissioners, unless the appellant, by answer duly verified, shall put such matter in issue. No such question was raised by any ground of objection or answer filed below, and hence cannot be made here.

The judgment is affirmed, with costs.

Filed Jan. 6, 1885.

No. 11,459.

RETTIG v. NEWMAN ET AL.

PLEADING.—*Practice.—Amendment.*—Upon the trial of an action for partition it is not error to permit the defendants, at the close of the evidence, to amend their answer by the addition of words which contain no new fact, but merely modify the terms of the prayer.

From the Miami Circuit Court.

J. L. Farrar, J. Farrar, W. C. Farrar and J. T. Cox, for appellant.

H. J. Shirk, J. Shirk, J. M. Brown and N. H. Antrim, for appellees.

BLACK, C.—The appellant sued the appellees for partition of certain land in Miami county. The defendants answered jointly, admitting that they and the plaintiff were tenants in common of said real estate, each holding the undivided interest specified in the complaint, and alleging that the undivided interest of the plaintiff could not be set off to him in severalty, as in the complaint asked, without great injury to the defendants, facts being stated at considerable length, upon which it was claimed that it would be impossible to set off the interest of the plaintiff and that of the defendants, or the

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interest of either of them, or any several interest; that such a division would destroy the property for the use for which it had been prepared at great expense. Prayer that the property be found and adjudged to be indivisible without manifest injury to the defendants, and that a commissioner be appointed to sell it and to divide the proceeds among the parties.

The plaintiff replied by general denial. The cause was tried by the court. At the close of the evidence the defendants, by leave of court, over the objection of the plaintiff, amended said answer by inserting upon the margin thereof the following: "And they, said defendants, ask that they have partition of their several interests therein, as aforesaid."

The court found that the plaintiff and the defendants were the owners in fee and tenants in common of said real estate, specifying the shares of the parties as they were stated in the complaint, and that partition ought to be made. Thereupon it was adjudged that partition be made by setting off to each party his share in value. It was further found that the real estate could not be divided and set off in severalty without great injury. And the court appointed a commissioner to sell the real estate, approved his bond, and made an order of sale.

A motion for a new trial was made by the plaintiff, and was overruled. This action of the court is assigned as error.

It is insisted that the court erred in permitting the amendment of the answer, it being contended that thereby a new issue was introduced. No new facts were alleged by the additional words; there was simply a modification of the terms of the prayer. The plaintiff was seeking to have his share of the land set off to him in severalty. The parties were in agreement as to their several shares in the property. The defendants could not have their shares of the land set off to them in severalty without the plaintiff's obtaining the object of his suit. The question of partition of the land between the defendants was one which could not affect that of the right of the plaintiff to have his own individual share set off to him. The judgment ordering the sale of the whole

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property, from which the appeal was taken, was responsive to the prayer of the answer as it was before the amendment. We can not see how the plaintiff was injured by the amendment, which, but for the purpose of answering the earnest contention of the appellant, would not seem to deserve much notice.

There was evidence fully supporting the finding, which was not contrary to law.

The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the appellant's costs.

Filed Jan. 8, 1885.

No. 12,016.

STATE, EX REL. JOHNSON, *v.* DYER.

MANDAMUS.—*Signing Bill of Exceptions by Judge after Time Limited.—Absence from State.—Diligence.*—A writ of mandate will not be awarded against a judge to compel him to sign a bill of exceptions after the time limited, where he was absent from the State when the time expired, if the applicant for the writ fails to show proper diligence in presenting the bill for signing after his return. An unexplained delay of fifty days shows want of diligence.

Application for mandamus.

C. A. DeBruler, W. P. Edson and E. D. Owen, for appellant.
A. P. Hovey and G. V. Menzies, for appellee.

ELLIOTT, J.—The relator is the appellant in the case of *Johnson v. Gorham*, now pending in this court, and seeks by the present petition to obtain a mandate against the judge who tried the case, compelling him to sign a bill of exceptions.

It is alleged in the petition that the Honorable Azro Dyer, judge of the superior court of Vanderburgh county, was called to try the case by the judge of the Posey Circuit Court; that, upon overruling the motion for a new trial, the special judge of that court granted ninety days in which to

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prepare and file a bill of exceptions; that within the time limited the appellant prepared a correct bill and took it to the residence of Judge Dyer for the purpose of having it signed; that the judge was absent from the State, and had been for a long time in the State of California; that the bill was presented to the judge of the circuit court, who declined to sign it, and it was then filed with the clerk of that court. It also appears that on the 17th day of October, 1884, the bill was presented to Judge Dyer, who made the following endorsement: "The foregoing document was this day presented to me for my signature, and I decline to sign the same for the reason that the time given for signing the bill of exceptions has expired. I will add that I was absent from the State of Indiana from July 5th to August 28th, 1884, but during all other times within the last six months I have been residing and present in the said State of Indiana."

We think that the writ must be refused for the reason that it is not shown that the appellant exercised proper diligence. It was his duty to have proceeded more diligently than he has done, for the delay, from the time Judge Dyer returned from California until the 17th day of October, was unreasonable. The document prepared by the appellant was not ready for signing until the last day of the time allowed by the court, and conceding that this was in time, still the unexplained delay from the return of Judge Dyer, on the 28th of August until the 17th day of October, constitutes such laches as precludes the appellant from securing the relief he seeks. It may be true that a judge, who grants time in which to file a bill of exceptions, can not, by his absence from the State, deprive the party of his bill, but a party can not unreasonably delay the presentation of the bill after the return of the judge. The allowance of time in which to file the bill is the grant of a privilege, and the party to whom it is granted will lose it unless he acts with reasonable diligence. It is important that delay should not be allowed, for bills of exceptions containing the evidence should be pre-

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pared and signed while the matter is still in the memory of court and counsel. A party can not secure a writ of mandate in such a case as this unless he shows that he has acted with diligence and promptness.

Demurrer to petition sustained. Writ refused.

Filed Jan. 9, 1885.

No. 10,761.

McCASLIN ET AL. v. THE STATE, EX REL. AUDITOR OF STATE.

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159	467
99	428
1167	631

EJECTMENT.—*Complaint.*—*Demand for Possession.*—In an action of ejectment for the recovery of real estate, no prior demand for the surrender of possession is necessary, and none need be alleged in the complaint, unless it be apparent from its other allegations that the relation of landlord and tenant exists, or has existed, between the plaintiff and defendant in regard to such real estate.

QUIETING TITLE.—*Possession.*—*Complaint.*—*Demand.*—Under section 1070, R. S. 1881, any person claiming title to real property, "either in or out of possession," may bring an action to quiet such title; and therefore, it is not necessary to allege in the complaint, in such action, either that the plaintiff is entitled to the possession, or has demanded possession, before the commencement of the suit.

FORMER ADJUDICATION.—*Party to Decree.*—*Estoppel.*—*Title to Real Estate.*—A party to a decree in a former adjudication between the same parties, in relation to the same subject-matter, is bound and concluded by each provision of the decree, and can not acquire any title to or interest in the real estate, which was the subject of the former adjudication, except by a substantial compliance with all the provisions of such decree.

EJECTMENT.—*Real Estate Owned by State.*—*Officers of the State.*—*Auditor of State.*—*Statutory Power.*—*Agreement.*—An officer of the State has no power or authority over any real estate, owned by the State, except such as has been or may be conferred upon such officer by positive statute; and where the State sues for the recovery of such real estate, and the defendant relies upon an alleged agreement with the auditor of State in defence of such suit, unless it appears that the auditor of State was expressly authorized by statute to make the agreement, as against the State such agreement is absolutely void.

SAME.—*Growing Crops.*—Where the plaintiff in ejectment recovers the land, he is entitled to the crops growing or cut and shocked thereon, which were planted after the commencement of his action.

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TAXES.—*Sale of State's Land for.*—*Deed.*—*Void.*—The sale and conveyance of land owned by the State, for delinquent taxes assessed thereon, are invalid and void, because the State's land is not subject to taxation.

TRESPASS.—*Husband and Wife.*—*Wife's Torts.*—*Joint Liability.*—*Damages.*—Under the law of this State, prior to September 19th, 1881, husband and wife were jointly liable in damages for the wife's torts, where it appeared that she was the principal tort-feasor and committed the trespass complained of, not in company with nor by the order of her husband.

From the Marion Circuit Court.

W. A. Lowe, B. F. Davis and S. A. Forkner, for appellants.
F. T. Hord, Attorney General, for the State.

Howk, J.—We take from the brief of appellee's counsel the following statement of facts in relation to this case, which we have found to be substantially correct:

The land in suit was purchased by the State for a House of Refuge for Juvenile Offenders, and the Legislature having resolved to change the location, a statute was enacted March 8th, 1867, authorizing the governor and commissioners of the House of Refuge to sell the same for cash, or on credit, and apply the proceeds thereof towards the purchase of other grounds, and the erection of suitable buildings for the institution, and upon full payment of the purchase-money in such case, the governor was authorized, in the name of the State, to execute a deed to the purchaser, attested by the secretary of state. 1 R. S. 1876, p. 549, 550, section 26.

Subsequent proceedings are recited in the case of *McCaslin v. State, ex rel.*, 44 Ind. 151, which was in evidence in the case below admitted by bill of exceptions.

On the 10th of June, 1867, Governor Baker made an agreement to sell to William McCaslin said land for \$7,500, payable in three equal instalments, of \$2,500 each, the first payable, with interest, the 15th day of October, 1867, the second payable May 27th, 1868, and the third payable the 27th of May, 1869, and on failing to pay any instalment the whole to become due. A writing was executed by Governor Baker to William McCaslin, wherein it was provided that said Mo-

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Caslin, upon the full payment of said purchase-money, would be entitled to receive from the State a deed for said tract of land, conveying the same to him. See the agreement and note in *McCaslin v. State, ex rel., supra*, pp. 159, 160.

William McCaslin and wife made a mortgage to the State on other lands to secure the purchase-money. *McCaslin v. State, ex rel., supra*, p. 161.

McCaslin entered into possession of the land purchased by him without any agreement therefor, and never at any time paid any portion of the principal or interest of the purchase-money.

On the 14th day of September, 1868, the State caused a deed for the land to be executed, acknowledged and prepared for delivery, and tendered the same to McCaslin upon condition that he should pay the purchase-money; but McCaslin refused to pay the same, or any part thereof, and he never received any deed for the land.

On the 26th of December, 1870, the State caused a written notice to be served on William McCaslin, demanding of him the possession of the land, and forbidding him to exercise any further acts of ownership over said tract of land, and that he should not cut or remove any timber therefrom until he complied with his contract, and paid to the State of Indiana the full amount of principal and interest due for said land. *McCaslin v. State, ex rel., supra*, pp. 155, 156.

The State, on the relation of the auditor, instituted an action against appellants to recover the possession of said land, and to enjoin the destruction and removal of the timber thereon, and for judgment against him on said note, and the sale of his interest held by him under his bond.

Suit was also instituted on the mortgage given by McCaslin and wife to the State to secure the purchase-money, and judgment was rendered thereon, and the same was sold for \$800, which was all that it would bring, being subject to a prior mortgage of \$3,000 (*McCaslin v. State, ex rel., supra*, p.

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168), and after paying costs left \$683.02 only, that went to the State. *McCaslin v. State, ex rel., supra*, pp. 168, 171.

A decree was rendered in favor of the State in said first described action for possession of the land, and after giving appellants credit for \$683.02, the proceeds of the sale of the mortgaged property, the court decreed that there is due to the State from the said McCaslin the residue of the note, amounting to \$8,801.98, and in order that the equity of redemption of McCaslin and wife may be forever barred and foreclosed, the court ordered that the interest of McCaslin and wife be sold; and further decreed "that the purchaser or purchasers, who shall purchase the interest of said McCaslin and wife in said land under this decree, shall have the right, within sixty days from such sale, to pay to the State of Indiana the balance, including interest, which may be due to the plaintiff on said promissory note, and thereby entitle him or them to have said tract of land conveyed to him or them in pursuance of the statute authorizing the sale and conveyance thereof, and upon failure of such purchaser or purchasers to pay, within the time aforesaid to the State of Indiana, the balance which may be due on said note, all the interest or equity of such purchaser or purchasers in said land shall, by such failure to pay, be forever barred and foreclosed." *McCaslin v. State, ex rel., supra*, pp. 171, 172.

The State held the legal title to the land, and never parted with it. McCaslin had no equitable title to the land as he had not performed the obligations of his bond; he had a right only under his bond to acquire the title upon payment of the purchase-money. The court ordered the interest of McCaslin to be sold upon the terms prescribed in the order, which it could lawfully do. *McCaslin v. State, ex rel., supra*, pp. 176, 181.

And the purchaser thereof acquired the right to pay off the purchase-money to the State within sixty days, and upon such payment to own the land, and if not paid, all right or claim in or to the land by any other party than the State,

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was barred under the judgment of the court. *McCaslin v. State, ex rel., supra*, pp. 176, 181.

The said judgment for possession and the sale of the McCaslin interest in the land was entered in the Marion Circuit Court, October 11th, 1871.

On the 2d day of December, 1872, process was issued on the judgment rendered against McCaslin and wife, and their interest under the bond given by Governor Baker was sold to Calvin R. Rooker, as the attorney of Margaret McCaslin, on the 8th of March, 1873, and he assigned the certificate of purchase to Margaret McCaslin, and a deed was made to her therefor, March 10th, 1874.

With this general statement of what may be regarded as the history of the cause, we proceed now to the consideration of the several errors complained of in this court. The appellee's complaint contained four paragraphs, to each of which the separate demurrer of the appellant Margaret McCaslin, for the alleged insufficiency of the facts therein to constitute a cause of action, was overruled by the court. These rulings of the court are severally called in question by the first four errors separately assigned by the appellant Margaret McCaslin. The record shows that upon the trial of the cause, the finding and judgment of the court in favor of the appellee are rested exclusively on the second, third and fourth paragraphs of the complaint. We need not, therefore, consider the question of the sufficiency of the first paragraph of complaint, because, for all practical purposes, that paragraph is out of the case.

In the second paragraph of complaint the relator alleged that the State of Indiana owned in fee simple, and was entitled to the possession of, certain real estate particularly described, in Marion county, containing one hundred acres; that the appellants, William and Margaret McCaslin, unlawfully kept the State out of the possession of such real estate, and had so done for six years then last past; that the appellant Margaret McCaslin claimed the real estate as her sepa-

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rate property, as between her and her co-appellant, William McCaslin; that the rents and profits, use and occupation, of such real estate were worth five hundred dollars per year; that the appellants had cut and carried away two hundred dollars' worth of timber from the land, and had destroyed and converted to their own use two thousand rails belonging thereto; that they had damaged the fences, buildings, growing timber and orchards upon such land by cutting and wearing them out, and ruining them, in the sum of \$500; that they had damaged such real estate by bad husbandry in the sum of \$1,000, all of which had occurred within six years last past; and that the appellant Margaret McCaslin had five thousand dollars' worth of property in her own right. Wherefore, etc.

In the third paragraph of complaint the relator alleged that the State of Indiana owned, in fee simple, certain described real estate in Marion county; that the appellants, William and Margaret McCaslin, were in possession of such real estate, claiming the same by title adverse to the State of Indiana; that such claim was without foundation, but still was a cloud upon the State's title; and the relator asked that such claim be declared void, and that the appellants, by a decree of the court, be adjudged to have no such title, and that the title of the State be forever quieted as against the appellants' title. Wherefore, etc.

In the fourth paragraph of complaint the relator alleged that, in 1871, the State of Indiana, on the relation of the then auditor of State, duly recovered in the court below a judgment and decree against the appellants (the substance of which we have heretofore given, in our statement of this case, and being the same judgment and decree considered by this court in *McCaslin v. State, ex rel.*, *supra*, pp. 151-183), setting out a copy thereof; that on the — day of —, 1872, an order of sale was issued upon such judgment, and placed in the hands of the sheriff of Marion county, where such real estate is situate; that such proceedings were had, under such order of sale, that on

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the — day of —, 1873, the real estate therein described was duly advertised for sale by the sheriff, and sold for the sum of \$165 to one C. F. Rooker, and the sheriff's certificate of such sale was duly assigned by him to the appellant Margaret McCaslin, who, after the expiration of one year, received a sheriff's deed of such real estate, which deed was then of record in the recorder's office of Marion county; that before and after such sheriff's sale State and county taxes were assessed against the appellants, and extended upon the tax duplicate of such county; that to strengthen their title to such real estate the appellants suffered such taxes to become and remain delinquent, and suffered such real estate to be sold by the treasurer of Marion county, and bid in the same, either through a trustee or in their own names (which of them the relator was unable to say), and afterwards received a tax deed thereof; and the relator averred that such proceedings, all and singular, were void as against the State of Indiana, and its right and title in and to such real estate; that the assessment of such land, as against the State, was null and void; that such tax proceedings were void, because of the appellants' collusion and fraud in procuring the taxation and sale of such real estate; that at the time of such tax sale and since, the appellants had ample personal property to pay such taxes; that the real estate was not advertised for sale for such taxes for four weeks, as required by the statute, in a public newspaper; and that the land was sold for twenty-five dollars more taxes than were due thereon. This paragraph then stated substantially the same facts as the second paragraph in relation to the rental value of the land, the cutting and removal of timber therefrom, the carrying away of the rails thereon, and the damage done and suffered to be done to the orchards, fences and buildings on the land, by the appellants.

And the relator further averred that he had demanded possession of such real estate from the appellants, which they refused to surrender; that the said judgment was wholly un-

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paid, and there was due thereon the sum of \$10,000; and that the appellant Margaret McCaslin had \$2,000 worth of property in her own right, and enjoyed the same as her separate estate. Wherefore the relator prayed for a writ of possession to be issued to the sheriff of Marion county, commanding him to eject the appellants and their tenants from such real estate, and demanded judgment that the title of the State of Indiana, in and to the land, should be quieted as against the appellants, and all persons claiming under them, etc.

The only objection urged by appellants' counsel, in argument, to the second and third paragraphs of complaint, is that no demand is alleged in either of such paragraphs for the possession of the real estate. The second paragraph is a complaint in ejectment in the statutory form; and, in such a complaint, it has never been held necessary to aver a demand. No demand for the surrender of the possession of the land is necessary, and none need be alleged, unless it appear from the other allegations of the complaint that the relation of landlord and tenant existed between the plaintiff and the defendant; and no such relationship between the parties is shown in the second paragraph of complaint in the case at bar. *Indianapolis, etc., Union v. Cleveland, etc., R. W. Co.*, 45 Ind. 281.

The third paragraph of complaint was a complaint to quiet the title of the State of Indiana to the real estate in controversy against the unfounded claims, as alleged, of the appellants. In such a complaint, it was not necessary to allege either that the State was entitled to the possession, or had demanded possession from the appellants, for the code provides that an action may be brought by any person, "either in or out of possession," to quiet the title to real property. Section 1070, R. S. 1881; *Schori v. Stephens*, 62 Ind. 441.

In the fourth paragraph of complaint the relator first pleaded the judgment and decree which the State of Indiana, in 1871, recovered against the appellants in relation to the real estate now in controversy. It was then adjudged and

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decreed, among other things, "that the plaintiff, the State of Indiana, recover of and from the defendants the possession of the land mentioned in the complaint herein, situate in Marion county, Indiana, and described as follows:" (describing the land now in suit), "and that an execution issue herein reciting the foregoing recovery, requiring the sheriff of Marion county aforesaid to deliver possession of said tract of land to the State of Indiana, or its agents. And it is further ordered, adjudged, and decreed by the court that there is due to the State of Indiana from the said William McCaslin, on the promissory note given for the purchase-money of the land described in the complaint, the sum of nine thousand four hundred and thirty-five dollars, less the sum of six hundred and eighty-three dollars and two cents, realized by the plaintiff by a sale under a decree of foreclosure of other real estate mortgaged by William McCaslin and Margaret McCaslin, his wife, to secure the payment of such note, leaving the net sum now due the plaintiff from William McCaslin, on said note, eight thousand eight hundred and one dollars and ninety-eight cents; and, in order that the equity of redemption of William McCaslin and Margaret McCaslin, his wife, may be forever barred and foreclosed, it is hereby ordered, adjudged, and decreed by the court that all their right, title and interest in and to the aforesaid one hundred-acre tract of land hereinbefore mentioned, bounded and described, be sold by the proper officer without relief from valuation or appraisement laws, as other lands are sold upon execution, for the payment of the costs of this suit, and the payment of the sum so decreed to be due the plaintiff from the defendant William McCaslin, as aforesaid.

"And it is further ordered, adjudged, and decreed by the court that the purchaser or purchasers, who shall purchase the interests of said McCaslin and wife in said land under that decree, shall have the right, within sixty days from such sale, to pay the State of Indiana the balance, including interest, which may be due to the plaintiff on said promissory note,

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and thereby entitle him or them to have said tract of land conveyed to him or them, in pursuance of the statute authorizing the sale and conveyance thereof; and, upon failure of such purchaser or purchasers to pay, within the time aforesaid, to the State of Indiana the balance which may be due on said note, all the interest or equity of such purchaser or purchasers in such land shall, by such failure to pay, be forever barred and foreclosed."

We have set out at length these provisions of the judgment and decree of the trial court in 1871, not alone because they are peculiar and out of the ordinary course, but because the subject-matter of that judgment and decree and the parties thereto are precisely the same as the subject-matter and the parties in and to the case in hand. The rights and interests of the appellants, and each of them, in and to the land in controversy, are largely dependent upon, and, indeed, are to be measured and determined by, the provisions of the judgment and decree under which they claim to have acquired title to such land. Besides, the only objection urged by the appellants' counsel to the sufficiency of the fourth paragraph of complaint is based upon the provisions of the judgment and decree of the court in 1871. It is too late now for the appellants, or either of them, to call in question any of the provisions of that judgment and decree. They were parties to that judgment and decree; they had their "day in court" in connection therewith, not only in the trial court, but also in this court, where, upon their own appeal, the judgment and decree were, in all things, affirmed. They are absolutely bound and concluded by each and every provision of that judgment and decree, and neither of them could acquire any title or interest thereunder in or to the land in controversy, except by a substantial compliance with all such provisions.

When, after pleading such judgment and decree, it was further alleged in the fourth paragraph of complaint that, under an order of sale issued thereon, the land had been sold by the sheriff to C. F. Rooker for the small sum of \$165, in

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1873, and that neither he nor his assignee, Margaret McCaslin, had paid, within sixty days from such sale, as required by the court, the balance due the State from William McCaslin, as found and adjudged by the court, including interest, but that, although more than seven years had elapsed, the judgment was wholly unpaid, we need not argue for the purpose of showing that the fourth paragraph stated a good cause of action against each and both of the appellants.

The State of Indiana owned in fee simple the real estate in controversy. By section 26 of "An act to establish a House of Refuge," etc., approved March 8th, 1867, in force from its passage, after describing the land in controversy, it is provided as follows: "The governor and said commissioners are hereby authorized to sell the same for cash or on credit, and apply the proceeds thereof towards the purchase of other grounds and the erection of suitable buildings for the institution, and, upon full payment of the purchase-money in such case, the governor is authorized, in the name of the State, to execute a deed to the purchaser, attested by the secretary and seal of the State." 1 R. S. 1876, p. 549.

For aught that is shown to the contrary in the record of this cause, the State of Indiana still owns the land in fee simple, and is entitled to the possession thereof. This is settled, and settled conclusively, against each and both of the appellants, in *McCaslin v. State, ex rel., supra*. Unless it is shown by the record that the appellants, or one of them, acquired the State's title to the land in some legal manner, under or subsequent to the judgment and decree of the court in 1871, it must be held, we think, that the judgment in the case now before us, in favor of the State, is right, and ought to be affirmed.

The appellants jointly answered by a general denial; and each of them filed a separate special paragraph of answer, William McCaslin in abatement, and Margaret McCaslin in bar, of the relator's action. The court sustained the relator's demurrers to these separate special paragraphs of answer, and

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these rulings are properly assigned here as errors. In her separate answer the appellant Margaret McCaslin alleged that she then was, and for more than ten years past had been, the wife of her co-appellant; that she was not then, and never had been, indebted to the State of Indiana in any sum of money; that she was the owner, in her own right, of sixty-five acres of land on the — day of June, 1867, described as follows: (description omitted); that, at the time last mentioned, such real estate was of the value of \$6,000; that the State of Indiana took a mortgage upon said land to secure the payment of a debt owing from the appellant William McCaslin to the State, for the unpaid purchase-money of the land described in the relator's complaint; that the State, upon a foreclosure of said mortgage, purchased the mortgaged land at sheriff's sale; that prior to the bringing of the action by the State to foreclose such mortgage on her separate real estate, an agreement was made in that behalf, on her separate account, with the State of Indiana, through the auditor of state, Thomas B. McCarty, and also his successor in office, John D. Evans; that, under and by virtue of said agreement, she was authorized to and did receive a deed from the sheriff of Marion county, conveying to her all the right, title, claim and interest of the State in and to the real estate described in the relator's complaint, which deed was dated March 10th, 1874, and was recorded, etc.; and this paragraph of answer contains a statement of other matters, occurring since the execution of such sheriff's deed, which add nothing to the sufficiency of the paragraph, and need not be set out.

It is manifest, we think, that the question of the sufficiency of this paragraph of answer is wholly dependent upon the response which must be given to this further question, namely, was the alleged agreement of the auditors of state with the appellant Margaret McCaslin a valid and binding agreement as against the State? Were the auditors of state authorized and empowered to bind the State by any agreement in relation to the land in controversy? It needs no argument to

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show that these questions must be answered in the negative. The General Assembly of the State, as we have seen, had authorized the sale, not the exchange, of the land, and had authorized the governor and the commissioners of the house of refuge, not the auditor of state, to sell the same for cash or on credit. The auditor of state had nothing whatever to do with the sale of the land, and any agreement he may have made in relation thereto with the appellants, or either of them, was and is absolutely void, and of no binding force against the State of Indiana. This proposition is so plain and so manifestly right that it hardly needs the citation of any authority in its support. A State officer can only deal or contract in relation to the property of the State, when he is authorized so to do by the express provisions of law; and any agreement he may make, or attempt to make, in relation to such property, when he is not so authorized, is void as against the State. We conclude, therefore, that the court did not err in sustaining the demurrer to the separate special answer of the appellant Margaret McCaslin.

In his separate special answer, the appellant William McCaslin, stated at length all the facts showing, or tending to show, that all his interest, right, title or claim, in or to the land in controversy, had been sold and conveyed away from him by the sheriff of Marion county. This answer was pleaded in abatement of the action as against William McCaslin; but, whether pleaded in abatement or in bar, we think the answer was clearly bad on demurrer. The relator sought in this action, among other things, to enforce the judgment and decree which the State, in 1871, recovered against William McCaslin and his wife, to recover for the State the possession of the land in controversy, which possession the McCaslins unlawfully withheld from the State, and to quiet the State's title to the land as against both the appellants. It is very clear that the sale and conveyance of William McCaslin's title to or interest in the land would neither abate nor bar the relator's action. The answer was pleaded to the

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entire complaint, and is in palpable violation of the well settled rule of pleading, under the code, which requires that an answer must be responsive to the entire complaint, or to so much thereof as it purports to answer, or it will be held bad on demurrer, for the want of sufficient facts. *Smith v. Little*, 67 Ind. 549; *Frazee v. Frazee*, 70 Ind. 411; *Douch v. Bliss*, 80 Ind. 316.

The next alleged error, of which complaint is made by the appellants' counsel, is the refusal of the court to grant the appellant Margaret McCaslin leave to file a cross complaint herein. It is sufficient for us to say, that this alleged error of the trial court is not so saved in, nor shown by, the record of this cause, as to present the ruling complained of, for our consideration. When the ruling was made, the record shows that the appellant Margaret excepted, and sixty days were given her to prepare and file her bill of exceptions; but it does not appear that such bill was ever filed. It is true, that the clerk below copied into the transcript before us what purports to be the cross complaint, which the appellant Margaret McCaslin asked leave of the court to file. But the court refused to allow it to be filed, it never was filed, and it does not constitute a part of the record. This is settled by many decisions of this court. *Stott v. Smith*, 70 Ind. 298; *Dunn v. Tousey*, 80 Ind. 288; *Peck v. Board, etc.*, 87 Ind. 221; *Scotten v. Randolph*, 96 Ind. 581.

Upon the trial of the cause by the court, the Honorable Ralph Hill presiding as special judge by agreement of the parties, there was a general finding in favor of the State against both of the appellants, upon the second, third and fourth paragraphs of complaint. A part of the finding of the court was, "that the State of Indiana is entitled to recover of and from said William McCaslin and Margaret J. McCaslin the sum of fourteen hundred dollars damages, for the wrongful detention of the land, and for timber cut off and carried away from the land." The court rendered a judg-

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ment and decree, in accordance with its finding, in favor of the State and against both of the appellants.

Errors are assigned by the appellants upon the overruling of their joint and separate motions for a new trial. We think the finding of the court is abundantly sustained by the evidence. Indeed, it seems to us that there was no legal evidence to the contrary. The alleged agreement of the auditors of State was absolutely void. The sheriff's sale and conveyance did not operate to convey the State's title to the land, because the terms of the decree were never complied with. The sale for taxes was invalid and void, because the State's land was not subject to taxation.

But it is claimed that the finding and judgment against the appellant Margaret J. McCaslin were erroneous, and can not be sustained, because she was a married woman during the entire time covered by the relator's complaint. The evidence shows, however, that she was the principal tort-feasor in the wrongs complained of by the relator. She claimed to own the land; she refused to surrender the possession; and it was shown that William McCaslin was simply her agent. The court was justified in finding, as we may assume that it did, that the wrongs of which the relator complained were her personal torts, committed by her, not in company with nor by the order of her husband. Under the law of this State, as it was at the time of the commencement of this suit, and prior to September 19th, 1881, husband and wife were jointly liable in damages for such torts of the wife. *Ball v. Bennett*, 21 Ind. 427; *Stockwell v. Thomas*, 76 Ind. 506.

The court further found, and decreed accordingly, "that the State of Indiana is entitled to crops, grass, corn and other crops now growing upon the land, including the wheat now cut and shocked thereon." It is claimed that this finding and decree were erroneous. We do not think so. Where, as in this case, the plaintiff in ejectment recovers the land, he is entitled to the crops thereon, growing or cut and shocked thereon, which were planted after the action was commenced.

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Adams Eject. (4th ed.) 416; *Lane v. King*, 8 Wend. 584; *McLean v. Bovee*, 24 Wis. 295; *Rasor v. Qualls*, 4 Blackf. 286.

It appears to us from the record before us "that the merits of the cause have been fairly tried and determined in the court below," and in such a case the statute forbids that any "judgment shall be stayed or reversed, in whole or in part." Section 658, R. S. 1881.

The judgment is affirmed, with costs.

Filed Jan. 10, 1885. Petition for a rehearing overruled March 13, 1885.

No. 11,672.

FITCH ET AL. v. FIRST NATIONAL BANK OF RISING SUN ET AL.

FRAUDULENT CONVEYANCE. - Evidence. - Transfer to Bank. - Husband and Wife.—In an action to set aside certain conveyances as fraudulent, made by an insolvent debtor to a bank in payment of credits due the bank, as was claimed, evidence that such debtor's wife then held \$37,700 of the stock of such bank in trust for him, has a tendency to show that such transfer was fraudulent as against other creditors.

SAME.—The fact that a large amount of property, consisting of town lots, saw-mill, saw-logs, lumber and other personal property, was conveyed by an insolvent debtor to such bank in payment of credits claimed to be due, without inventory, measurement or count, furnishes some evidence that such transfer was fraudulent as against other creditors.

SAME.—Where the cashier of such bank is cognizant that the transfer of such property will inure to the benefit of one of such debtors by enhancing the value of the stock held by his wife in trust for him, and that such excess is thus placed beyond the reach of other creditors of such debtors, these facts, in connection with the fact that such cashier knows that such debtors are insolvent, furnish some evidence that said bank participated in the alleged fraudulent intent of such debtors.

SAME. - Estoppel.—The fact that one of the creditors who instituted the action had obtained a judgment, and had levied upon one of the pieces of real estate that had been transferred, did not preclude him from maintaining the action.

SAME. - Weight of Evidence.—Where the evidence in such case tends to support the finding, the Supreme Court will not disturb it.

From the Ripley Circuit Court.

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J. K. Thompson, J. D. Haynes, B. Harrison, W. H. H. Miller, and J. B. Elam, for appellants.

A. C. Downey, A. C. Harris, C. E. Walker, J. D. Miller, F. E. Gavin, W. A. Moore, J. O. Marshall, H. D. McMullen, and D. T. Downey, for appellees.

BEST, C.—The First National Bank of Rising Sun, the First National Bank of Indianapolis, several other banks and persons, all judgment creditors of DeWitt C. Fitch and Henry Fitch, brought this action against them, Leah Fitch and the City National Bank of Lawrenceburgh, to set aside as fraudulent certain conveyances of real property and certain transfers of personal property made by said debtors to said bank, and a certain transfer of the stock of said bank made by DeWitt C. Fitch to Leah Fitch, and to subject the same to the payment of their respective judgments.

Issues were formed, a trial had, a finding made, and judgment rendered for the appellees. A motion for a new trial, on the ground that the finding was not sustained by the evidence, and was contrary to the law, was overruled, and this ruling is assigned as error. Since this appeal was perfected Leah Fitch has dismissed the appeal as to her, and no question remains as to the order cancelling the transfer of stock to her.

The appellants insist that the property transferred to the bank was transferred in payment of *bona fide* debts due the bank from DeWitt C. Fitch and Henry Fitch, and that there is no evidence in the record of any purpose, upon the part of either of them, or upon the part of the bank, to hinder, delay or defraud the appellees, or any of the other creditors of DeWitt C. Fitch and Henry Fitch. This the appellees dispute, and insist that the evidence fully supports the finding. The established rule of this court, often announced and well understood, is, that if there is any evidence legally tending to support the finding, this court will not disturb the judgment upon a question involving the mere weight of the evidence. Being governed by this rule, we can only examine the evi-

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dence for the purpose of determining whether or not the material and controverted averments of the complaint are wholly unsupported by it. There are, in this case, the averments that the conveyances and transfers were fraudulently made and received. The evidence developed many facts, the more important of which are these: On and prior to the 2d of February, 1883, the First National Bank of Lawrenceburgh was in existence. Its capital stock was \$100,000, the most of which was held by DeWitt C. Fitch, who was its president. Henry Fitch was, and for years had been, its cashier, and held \$6,000 of stock. Its charter then expired, and the City National Bank of Lawrenceburgh was organized as its successor. The assets of the old bank were transferred to the new, and the stock of the old was surrendered and a like amount of the new was issued to each of the stockholders. Of this DeWitt C. Fitch received \$78,700, Henry Fitch \$6,000, Walter Fitch \$5,000, and the residue was divided between a half dozen other persons. A board of directors was elected, and DeWitt C. Fitch was selected as president, Henry Fitch, vice-president, and Walter Fitch, cashier. At this time, and until the suspension of the bank in August thereafter, Henry Fitch was extensively engaged in manufacturing and dealing in lumber, and gave the business of the bank but little attention; neither did his father, DeWitt C. Fitch, who was looking after his farming interests. The management of the bank devolved almost exclusively upon Walter, the cashier, who was also a son of DeWitt C. Fitch. During the whole of this time DeWitt C. and Henry were largely involved, and if they owed the bank the amounts claimed, as they probably did, each was hopelessly insolvent. On the 4th of May, DeWitt C. Fitch transferred to Mrs. Sunman, the mother-in-law of Walter, \$10,000 of his stock; on May 9th he transferred to Leah Fitch, his wife, \$26,000 of his stock; on July 10th he transferred to his wife \$37,700 more of his stock, and the balance he transferred to George F. Fitch, a brother. He also owned a large amount of real

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estate in this State, and 900 acres of land in Wisconsin. The last named tract he and his wife conveyed to Walter, and on the 2d day of August, he, his wife not joining him in the deeds, conveyed all the rest of his real estate to the bank. This consisted of a great many different parcels, all of which were situated in Dearborn county except one. The parcels in Dearborn county were embraced in a single deed, the consideration of which was named as \$58,506.45. The consideration of the other parcel was \$200, and the aggregate the exact amount of the debt due the bank. This left DeWitt C. Fitch without any means with which to pay creditors. Henry owned a number of lots in the city of Lawrenceburgh, upon some of which was situated a valuable saw-mill. He also owned a large number of saw-logs, a great quantity of lumber, a number of cars and other personal property. All this he conveyed and transferred to the bank on the same day that his father made his deeds, without making an inventory of the personal property, or, indeed, without knowing how much there was of it. The aggregate consideration named in the deed and bills of sales was \$54,310, the amount of his debt to the bank. At this time Henry was sick, and was unable to make a delivery of this property, and none was made until the 9th of August. In the meantime, his employees, twenty in number, run the mill and carried on his business as usual. After the transfer of this property Henry was without means with which to pay debts. The claims of the bank against himself and his father were then surrendered. At the same time Leah Fitch, without consideration, retransferred \$10,000 of her stock to her husband, who, through Walter, negotiated it in Cincinnati, and with the proceeds paid some other debts. On the day after the delivery of Henry's property to the bank it suspended and went into voluntary liquidation. It then owed its depositors \$100,000, one-half of which it has since paid. On the 11th and 13th of September thereafter, the appellees recovered judgments in the Dearborn Circuit Court upon various

claims, which antedate the 2d of August, against DeWitt C. and Henry Fitch, in sums aggregating more than \$40,000. Executions were at once issued upon these judgments, one of which was levied upon a part of the real estate in controversy, and the others remain in the sheriff's hands. All the deeds and bills of sale were absolute in form.

In addition to these facts, the evidence tended to show that Walter was cognizant of, and was instrumental in procuring, the transfer of the \$37,700 of stock from his father to his mother; that he prepared a statement purporting to show that his father owed his mother \$4,100 for dividends upon stock to which she was equitably entitled, to an annual rental of \$1,175 for the eight or nine preceding years, and some other items that aggregated \$28,000 or \$29,000, for which the transfer was made; that he knew of his father's other debts and of his brother's debts, and that he was familiar with all the transfers of stock and of property. It further tended to show that the value of Henry's property largely exceeded his debt to the bank, and that he understood that the excess was to be applied in payment of his other debts, and that, notwithstanding the transfer, he expected some arrangement would be made whereby he would be enabled to continue his business. This is the substance of the evidence tending to sustain the charge.

On the other hand, the evidence satisfactorily shows that the father of Leah Fitch bequeathed to her \$21,000 of stock in the First National Bank of Lawrenceburgh, and upon the organization of the City National Bank, this stock was embraced in the \$78,700 of stock issued to DeWitt C. Fitch, and his transfer of \$26,000 of such stock was in payment of the stock thus received by him and of dividends which he had received thereon. The validity of this transfer is not now questioned. The evidence also tended to show that the conveyance of the Wisconsin land was in consideration of the assumption of other debts by Walter, amounting to nearly the value of the land, and that the transfer of stock to George

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F. Fitch was in part payment of a debt justly due him. It further tended to show that DeWitt C. Fitch and Henry Fitch were each justly indebted to the bank as claimed, and that the conveyances and transfers were made and received simply and solely for the purpose of paying such debts.

On the whole evidence, the question of intent was one of fact, and we do not think we can say that there was no evidence in support of the charge. At the time this property was transferred to the bank, Leah Fitch held the bulk of its stock, and it is obvious that its transfer inured to her benefit. It would not only relieve her of any individual liability to the creditors of the bank, but it would largely enhance the value of her stock, and thus enable her to enjoy the bulk of the proceeds of the property. If she had been the *bona fide* owner of the stock, and the transfer of the property had been made solely for the purpose of paying debts, the fact that she held the stock would in no manner impair the validity of the transfer; but she was not the *bona fide* owner of \$37,700 of the stock. This was held by her fraudulently. At least the evidence tends to prove it, and the court has so adjudged it. This fact is not now controverted, and must be deemed established. The retransfer of \$10,000 of this stock to her husband indicates that she held it in trust for him, and, if so, the conveyance of all his property to the bank inured, in a manner, to his own benefit. If this stock had remained in his name, perhaps this fact would have been immaterial, as his creditors could have seized the excess in its new form, but it was not so left; it was placed beyond their reach, and so was the property. These things furnish some evidence of the intent charged on the part of DeWitt C. Fitch.

Henry Fitch had no stock, but the fact that he conveyed and transferred all his property, consisting, as it partly did, of a large number of saw-logs, of a vast quantity of lumber and other personal property, without an inventory, without measurement or count, and without, in fact, knowing how much there was of it, coupled with the further fact that there was

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some testimony tending to show that the property exceeded in value largely the amount of his debt to the bank, furnishes some evidence in support of the charge against him.

Walter assisted in obtaining the transfer of the \$37,700 of stock from his father to his mother, and he must have known that while she held the legal title his father was the beneficial owner. He must also have known that the transfer of this property would largely enhance the value of the stock held by the mother for the father, and that so much of the property as produced the enhancement was thus placed beyond the reach of creditors. He must also have known that the effect of Henry's conveyance was likewise to place the excess, if any, of his property beyond the reach of his creditors. These things, in connection with his knowledge of his father's and brother's insolvency, furnish some evidence of the bank's participation in the alleged fraudulent intent.

We are, therefore, of opinion that we can not disturb the judgment upon these questions of fact.

It is also suggested that the levy of the execution in favor of the City National Bank of Greensburgh was *prima facie* a satisfaction of the judgment, and that such fact precludes said bank from maintaining the action. We think otherwise. The bank did not seek the recovery of another judgment, but simply an order setting aside the alleged fraudulent conveyances, so as to sell the property upon its execution. This was in aid of its writ, and the previous levy in no manner impaired its right to such order; besides, if its judgment had in fact been paid, this fact would not have prevented the other creditors from obtaining the proper order. Though all united, the action was not joint in the sense of requiring a recovery by all or by none.

For these reasons we think the judgment should be affirmed.

PER CURIAM.—It is therefore ordered that the above judgment be affirmed, at the appellants' costs.

Filed Jan. 8, 1885.

VOL. 99.—29

Alexander v. The State.

No. 11,977.

ALEXANDER v. THE STATE.

CRIMINAL LAW.—*Gaming.—Evidence.*—A charge in an indictment, that the defendant played a game of pool upon a pool table with another person, and thereby won money from him, is sustained by proof that the parties played under an arrangement that the losing party should pay the owner of the table the amount charged for the use of it, and that the defendant won the games, and the other party paid for them.

SAME.—It is not necessary to prove the winning of the whole amount charged in the indictment.

From the Henry Circuit Court.

J. Brown and — *Brown*, for appellant.

F. T. Hord, Attorney General, *G. W. Duncan*, Prosecuting Attorney, and *W. O. Barnard*, for the State.

ZOLLARS, C. J.—Section 2081, R. S. 1881, provides that “Whoever, by playing or betting at or upon any game or wager, or upon the result of any game, * * * either loses or wins any article of value, shall be fined,” etc. The indictment upon which appellant was convicted is based upon this statute, and charges that he played a game of pool upon a billiard and pool table with one Koons, and thereby won from him one dollar in lawful money, etc.

The testimony is that these parties, at the time and place charged, played several games of pool; that the proprietor of the table charged five cents per cue, or five cents for each person engaged in each game, in this instance ten cents per game, and that in each game the person who lost it was to pay, and did pay, for both cues, or the game, which was the same thing, and that appellant won several of the games for which Koons paid.

It is conceded that it is not necessary to prove the winning of the whole amount charged in the indictment. The contention is, that as the loser was to pay, and did pay, to the proprietor of the tables, the charge for the game, instead of paying that amount to the successful party, the proof does

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not sustain the charge in the indictment that appellant won money from Koons.

The purpose of the statute is to suppress gaming in all its varied forms, and it should have such a reasonable construction and application as to accomplish that purpose. To adopt a theory so refined as that advanced by appellant would enable parties, by ingenious arrangements, not only to thwart the purpose of the statute, but to avoid it altogether. The arrangement here was just as much gaming as if the losing party had agreed to pay, and had paid, to the successful party the amount charged for the game, and he had paid it over to the owner of the table.

To whom the money was directly paid was not so material as the fact that the game decided who should pay it, and who should profit by the payment. If appellant had lost the games, he would have lost the amount charged for them. He won the games and thereby won the amount charged for them, or at least one-half of that amount. At the end of each game he was ten cents better off than if he had lost the game, and he was five cents better off than he would have been, if, without any chance or hazard, each party had paid for his cue. That he did not actually handle the money, it seems to us, can make no difference.

The case of *Mount v. State*, 7 Ind. 654, was under section 28, 2 R. S. 1852, p. 435, which is substantially the same as section 2081, *supra*. There, as here, the losing party was not to pay the money over to the winning party, but was to pay the amount charged for the game to the owner of the ten-pin alley. It was contended that the case was not within the statute. In meeting that contention the court said:

"To constitute unlawful gaming, there must be a game played, and upon its result some article of value must be lost and won. Here was such game, and the only point of inquiry is, was any article of value won by the defendant? His liability to Groff" (the owner of the alley) "was paid by Miller," (the losing party,) "because, in the event of being unsuc-

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cessful, he had stipulated to pay it. This payment, though made to Groff, was for the use of the defendant; and the transaction was, in effect, the same as if the amount lost and won had been paid to the defendant instead of Groff, and he had received it from the defendant."

Section 2079, R. S. 1881, is similar to section 2081, *supra*, except that it has reference to the owner of buildings, etc., kept and used for gaming. This section is substantially the same as section 29, 2 R. S. 1876, p. 469, under which it has more than once been held that facts similar to the facts in this case make a case of gaming within the inhibition of the statute. See the well considered case of *Hamilton v. State*, 75 Ind. 586, and cases there cited. These adjudications are authority here, and support our conclusion that the evidence sustains the charge in the indictment, and makes a case under the statute.

The judgment is affirmed with costs. ♣

Filed Jan. 10, 1885.

No. 11,394.

THE STATE, EX REL. TALBOTT ET AL., v. EMMONS ET AL.

PARTNERSHIP PROPERTY.—Exemption.—Individual Debt.—One partner can not claim the partnership property, or any specific part thereof, as exempt from sale on an execution against him for his individual debt.

SAME.—Assets and Liabilities Equal.—Suit against Sheriff.—Damages.—Where, in such a case, the partner claims his interest in the partnership property as exempt from sale on the execution, and the sheriff allows such exemption and returns the writ unsatisfied, and where, in a suit against the sheriff and his sureties, by the execution plaintiffs, to recover damages for the sheriff's failure to levy upon and sell the partner's interest in the partnership property, the court finds that the assets and liabilities of the partnership were equal in amount, and that the partner's interest in such property was of no value, and renders judgment thereon, in favor of such execution plaintiffs, for merely nominal damages, there is no such error in the judgment as authorizes the reversal thereof.

From the Putnam Circuit Court.

The State, *ex rel.* Talbott *et al.*, v. Emmons *et al.*

C. C. Nave, for appellants.

L. M. Campbell, for appellees.

Howk, J.—This suit was commenced by the appellant's relators against the appellees in the Hendricks Circuit Court. The relators' complaint counted upon the official bond of the appellee James M. Emmons, as sheriff of Hendricks county, and sought to recover damages for an alleged breach of his official duty, as such sheriff, in this: That he had failed and neglected to levy and collect a certain execution in his hands as such sheriff, in favor of the relators and against one Samuel H. Moore, etc. On the relators' application the venue of the cause was changed to the court below. There the cause was put at issue and tried by the court, and, at the appellees' request, the court made a special finding of the facts, and stated its conclusions of law thereon in favor of the relators, assessing their damages in the sum of one cent. Over the relators' exceptions to the conclusions of law, the court rendered judgment that they recover one cent damages, and that the appellees recover their costs.

The first error complained of in argument by the relators' counsel is the alleged error of the court in its conclusions of law upon the facts specially found. The court found specially that, prior to December 1st, 1880, the appellee Emmons had been elected sheriff of Hendricks county, for the term of two years, from November 7th, 1880, and had executed and delivered his official bond in the penal sum of \$5,000, with his co-appellees as his sureties therein, and had taken the oath of office, and, on December 1st, 1880, had entered upon the discharge of his official duties; that, on June 8th, 1880, the relators recovered a judgment in the Hendricks Circuit Court against Samuel H. Moore for \$475, upon an express contract, without relief from valuation laws; that, on January 19th, 1881, the relators sued out an execution on such judgment, and, on January 21st, 1881, placed the same in the hands of appellee Emmons, as such sheriff, which execu-

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tion was returned on the 22d day of April, 1881; that the execution defendant had claimed the benefit of the exemption law, and that all his property had been set off to him thereunder; that, on August 27th, 1881, the relators caused an *alias* execution to issue upon their judgment, which writ came to the hands of appellee Emmons, as such sheriff, on the same day; that, on October 20th, 1881, the execution defendant filed his schedule with appellee Emmons, as such sheriff, claiming the benefit of the exemption law of this State, and his property was duly appraised, and, being of less value than \$300, was again set off to him, and the execution was returned unsatisfied; that during all such time, from January 19th, 1881, to October 20th, 1881, the execution defendant, Samuel H. Moore, was in copartnership with his son in the town of Danville, in Hendricks county, in a confectionery and restaurant, under the firm name of Samuel H. Moore & Son, they being equal partners, in which they had during all such time a stock of goods of the value of \$550, which was partnership property belonging to such firm; and that, during all such time, the firm owed and was indebted in the sum of \$550; that one-half of the value of the stock of goods was \$275, and that the interest of Samuel H. Moore therein subject to the payment of partnership debts was of no value; that the execution defendant claimed his interest in the firm property, which was appraised at \$100, as exempt from execution, and such interest was set off and exempted to him, under his claim of \$300, as exempt from execution, which was done over the protest and against the directions of the relators' attorneys; that such judgment still remained wholly unsatisfied; that the execution defendant, Samuel H. Moore, during all such time, from January 19th to October 20th, 1881, was a resident householder of Hendricks county, and the head of a family.

Upon the foregoing facts the court stated its conclusions of law as follows:

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1. That the execution defendant, Samuel H. Moore, was not entitled to claim his interest in the firm property as exempt from execution under the exemption laws of Indiana; and,

2. That the relators were entitled to recover of the appellees the value of the interest of Samuel H. Moore in the partnership property, subject to the payment of the debts of such partnership, and no more.

There was no motion below by the appellant's relators either for a new trial or for a *venire de novo*, and the evidence is not in the record. By their exceptions to the conclusions of law, the relators admitted that the facts were fully and correctly found, but they said that the court had erred in applying the law to the facts so found in its conclusions of law. *Cruzan v. Smith*, 41 Ind. 288. Of course, the relators might have called in question the correctness of the facts specially found, or the failure of the court to find facts which were proved, by motions either for a new trial or for a *venire de novo*, but, as we have said, no such motions were addressed to the trial court. *Robinson v. Snyder*, 74 Ind. 110; *Braden v. Graves*, 85 Ind. 92; *Dodge v. Pope*, 93 Ind. 480; *Fairbanks v. Meyers*, 98 Ind. 92.

The appellees, as well as the relators of the appellant, excepted to the court's conclusions of law, but no cross error has been assigned by appellees. Their counsel suggest in argument that the trial court erred in holding, in its first conclusion of law, that the execution defendant was not entitled to claim his interest in the firm property, as exempt from execution, under the exemption laws of this State. We are not certain that we correctly understand the language used by the court in its first conclusion of law. If it was meant that the execution defendant was not entitled to claim a specific part or share of the firm property, or his interest therein, as exempt from execution, the holding of the court was clearly right, under the decisions of this court. *Love v. Blair*, 72

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Ind. 281; *Smith v. Harris*, 76 Ind. 104. In a legal sense, however, the interest of a partner in partnership property is not an interest in the specific property, but an interest in what may remain of the partnership assets, after the payment and discharge of all debts and liabilities of the firm to third persons and to each other, upon the close of the copartnership business. *Donellan v. Hardy*, 57 Ind. 393. We can see no good reason why an execution defendant might not claim such an interest in partnership property, as exempt from execution upon his individual debt, if the value of such interest did not exceed the amount exempted by law. We decide nothing upon this point, however, as it is not necessary that we should do so in this case. The first conclusion of law was favorable to the relators, and the appellees have not complained of it by an assignment of cross error.

The court found as facts that the execution defendant was a member of a firm whose liabilities were at all times equal to its assets, and that his individual interest in the firm's property was, therefore, of no value. As a conclusion of law, however, the court held that this valueless interest in the firm's property was not exempt from sale on execution. As a further conclusion of law upon all the facts specially found by the court, it was further held that the relators were entitled to recover of the appellees the value of the interest of the execution defendant in the partnership property, and no more; and upon this conclusion of law the court rendered judgment for the relators in merely nominal damages. The second conclusion of law and the judgment accordingly rest, of course, upon the well settled rule of law, at least, in this court, that partnership property must be first applied to the payment of partnership debts to their entire satisfaction, before any part of such property can be made applicable, in law or equity, to the payment of an individual debt of any member of the partnership. *Weyer v. Thornburgh*, 15 Ind. 124; *Bond v. Nave*, 62 Ind. 505; *Hardy v. Mitchell*, 67 Ind. 485;

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Bake v. Smiley, 84 Ind. 212; *Huff v. Lutz*, 87 Ind. 471; *Louden v. Ball*, 93 Ind. 232; *Dill v. Voss*, 94 Ind. 590. If the share or interest of the execution defendant in the partnership property had not been set off to him as exempt from execution, but had been sold on the execution, and the relators had become the purchasers thereof, they would have acquired no interest whatever in the property itself, but only the individual share of the execution defendant in the surplus remaining after all the partnership debts and prior liens had been fully paid. *Donellan v. Hardy*, *supra*.

We conclude, therefore, that upon the facts specially found there was no such error in the court's conclusions of law as would authorize the reversal of the judgment.

Appellant's relators have also assigned as error the overruling of their demurrer to the second paragraph of appellees' answer. By this alleged error substantially the same questions are presented as those already considered. It was alleged, among other things, that the execution defendant Samuel H. Moore was a householder and head of a family, in Hendricks county, and that during all the time mentioned in the relators' complaint, he never had or owned any property in such county, subject to execution; that he made and filed with appellee Emmons, as such sheriff, a schedule of all his property, as required by the statute, which was duly appraised at the sum of \$177; that he claimed all such property as exempt from execution, and that the same was set off to him, etc.

We think the paragraph of answer was sufficient to withstand the relators' demurrer, as it stated in substance all the material facts specially found by the court.

We find no error in the record.

The judgment is affirmed, with costs.

Filed Jan. 6, 1885.

 Redinbo v. Fretz *et al.*

No. 10,606.

REDINBO v. FRETZ ET AL.

PARTNERSHIP.—*Accounting.*—*Trial by Jury.*—*Practice.*—Under the law as it stood prior to 1881, parties to a suit to settle partnership affairs were entitled to a trial by jury.

SAME.—*Harmless Error.*—The refusal of a trial by jury is not a harmless error, although upon a second trial under the code of 1881 the parties would not be entitled to a jury.

SAME.—*Reference to Master Commissioner.*—Where a party is thus entitled to a trial by jury, the court could not, over his objection and demand for a jury, refer the case to a master commissioner.

SAME.—*Bill of Exceptions.*—The reference to the master being a part of the record without a bill of exceptions, the objection and exception to such reference is also a part of the record without a bill of exceptions.

SAME.—*Reference.*—*Written Consent of Parties.*—Under 1 R. S. 1876, p. 629, *et seq.*, the written consent of the parties to a reference to a master commissioner is not required, as in case of a reference to a referee under section 349, 2 R. S. 1876, p. 178.

From the Tippecanoe Circuit Court.

G. O. Behm, A. O. Behm, R. P. DeHart, J. R. Coffroth and T. A. Stuart, for appellant.

R. P. Davidson and J. C. Davidson, for appellees.

ZOLLARS, J.—The proceedings in this case, so far as they are material upon this appeal, were had under the code of 1852. That code, therefore, must control in the decision of the questions in controversy. In appellant's complaint below he charged that he had been a partner with appellees in the ownership and operation of a flouring mill, and other partnership property; that they had dissolved the partnership, taken possession of the partnership property and excluded him from the use and enjoyment of the same, and wrongfully converted to their own use money and other assets of the firm. The prayer was for an accounting between the partners, and judgment for \$5,000 in favor of appellant, the appointment of a receiver, the sale of the partnership property and the settlement of the partnership affairs.

The complaint was answered by a general denial. This

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made an issue of fact, and imposed upon appellant the burden of proving the several averments of the complaint. After the formation of the issues, the court made an order for the sale of the real estate described in the complaint, and appointed commissioners to make the sale. This order was made upon the agreement of the parties, and upon the further agreement that nothing in the subsequent proceedings in the case should invalidate, or in any way affect, the sale so ordered. After the order of sale was made, the court appointed a "special master commissioner," and directed him to take an account between the partners, together with the evidence relating thereto, and his finding, both of law and fact, and report the same to the court. It is contended by appellant that in the reference to the master, and the refusal of a trial by jury, the court below was in error. Appellees contend: First. That there was no error in this; Second. That if it be conceded that there was such error, it has become a harmless error, as under the code of 1881, appellant would not be entitled to a trial by jury, should a new trial be ordered; and, Third. That the question is not before us, because it was not saved and brought into the record by a bill of exceptions.

Appellant was clearly entitled to a trial by jury unless that right was waived. The Constitution declares that in all civil cases the right of trial by jury shall remain inviolate. Art. 1, sec. 20. The interpretation of this section has been that it secures a trial by jury in all cases that were regarded as civil cases at the time the Constitution was adopted, and that it does not cover cases in equity that were formerly not triable by jury. The Legislature can not curtail the right guaranteed by the Constitution, but it may extend the right of trial by jury to cases not included in the constitutional guarantee. This was done. Under the legislation of the State prior to the code of 1881, parties were entitled to trial by jury in equitable as well as law cases. The case before us, although a case of equitable jurisdiction, was covered by this legislation. Sec-

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tion 1, 2 R. S. 1876, p. 32; section 320, 2 R. S. 1876, p. 164; *Lake Erie, etc., R. R. Co. v. Heath*, 9 Ind. 558; *Hopkins v. Greensburg, etc., T. P. Co.*, 46 Ind. 187.

The case of *Allen v. Anderson*, 57 Ind. 388, is not in conflict with the above cases. That case was an attack upon a report of commissioners in partition, which did not, within the meaning of the constitutional and statutory provisions, involve the trial of an issue of fact. The case followed *Dillman v. Cox*, 23 Ind. 440, in which it was held that the trial to which these provisions apply was the trial preceding the interlocutory judgment of partition, and that they did not apply to motions merely. Had the case been submitted to the court for trial, the reference to the master would not have been erroneous. In a reference to a master, under 1 R. S. 1876, p. 629, *et seq.*, the written consent of the parties is not required, as in case of a reference to referees, under section 349, 2 R. S. 1876, p. 178. *McGillis v. Slattery*, 52 Ind. 44; *Stanton v. State, ex rel.*, 82 Ind. 463.

We turn to the last contention by appellees. A bill of exceptions was filed, but not in time to bring into the record the question in relation to the reference to the master and the denial of a trial by jury. Does the record, aside from the bill, present the questions? It is stated therein that upon motion of appellees the court appointed a special master commissioner, and directed him to take an account between the partners, together with the evidence relating thereto, make a finding thereon, and report the same to the court. It is further stated, that appellant objected and excepted to the order, because the court had no power to make such a reference, because appellant was entitled to a trial of the issues of fact by a jury, and that he demanded such a trial. The statute provided, and still provides, that all proper entries made by the clerk, and all papers pertaining to a cause, and filed therein (with certain named exceptions), are to be deemed parts of the record, "but a transcript of motions, affidavits, and other papers, when they relate to collateral matters, * *

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shall not be certified, unless made a part of the record by exception, or order of court," etc. Section 559, 2 R. S. 1876, p. 242; section 650, R. S. 1881. There was, and still is, a further provision that "Where the decision objected to is entered on the record, and the grounds of the objection appear in the entry, the exception may be taken by the party, causing to be noted at the end of the decision that he excepts." Section 345, 2 R. S. 1876, p. 177; section 628, R. S. 1881.

When the record does not otherwise show the decision or the grounds of objection thereto, the party objecting must, within such time as may be allowed, present to the judge a proper bill of exceptions, which, if true, he shall sign and cause to be filed in the cause. Section 629, R. S. 1881; section 346, 2 R. S. 1876, p. 177.

Under these sections the rulings have been, that where pleadings, papers or entries are a part of the record without a bill of exceptions, demurrers, objections and exceptions, and in some cases motions in relation thereto, are also parts of the record without a bill of exceptions. *Matlock v. Todd*, 19 Ind. 130. After holding that a motion for a new trial, and the entry of the ruling thereon, are parts of the record without a bill of exceptions, the court said: "And the grounds of the ruling, or decision, will, necessarily, sufficiently appear in the entry, taken in connection with the written motion specifying the grounds of it."

In the case of *Monroe v. Adams Ex. Co.*, 65 Ind. 60, it was held that, as the verdict and answers of the jury to interrogatories are parts of the record without a bill of exceptions, so a motion for judgment on such answers, the ruling of the court thereon, and the exception of a party, are parts of the record without a bill. Again, in the case of *Salander v. Lockwood*, 66 Ind. 285, in passing upon a motion for judgment upon such answer, it was said: "General and special verdicts and answers to interrogatories are a part of the record, without bills of exceptions. * * * Their inconsistency, therefore, if inconsistency exists, with the general verdict, ap-

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appears upon the face of the record. * * * * We think a motion in writing for judgment on the special findings, and the ruling of the court thereon, which must appear on the record, are all that is necessary, in connection with the verdicts already in the record, to present the decision of the court, and the reasons of it, and that no bill of exceptions is necessary. As to this point, *Shaw v. Merchants Nat'l Bank*, 60 Ind. 83, is overruled. We remark, that it was not necessary that the motion should be in writing. The journal entry would show the making of the motion. The reasons, if any existed for it, appeared by the verdict and answers to interrogatories." See, also, *Terre Haute, etc., R. R. Co. v. Clark*, 73 Ind. 168; *Campbell v. Dutch*, 36 Ind. 504.

In the case of *Doctor v. Hartman*, 74 Ind. 221, it was said: "Where full information and all essential facts are shown in the record, no bill of exceptions is necessary; or, as was said in *Young v. Martin*, 8 Wall. 354, no bill of exceptions is necessary where the error alleged is apparent upon the face of the record."

In the case before us, the entry of the order of reference to the master was a proper entry in the case, and hence that entry is a part of the record without a bill of exceptions, and hence the objection and exception to that order are also parts of the record without a bill, although the grounds of objection, as stated, possibly may not be. And under the ruling in the case of *Hauser v. Roth*, 37 Ind. 89, the statement of a demand for a jury is not a part of the record. Aside from these, it is apparent upon the face of the record that the reference to the master was over the objections and exception of appellant; that the case is one in the trial of which he was entitled to a jury, and that he did not waive that right, as was done in the case last above cited, nor in the manner provided by the statute. See section 340, 2 R. S. 1876, p. 173; section 550, R. S. 1881; *Shaw v. Kent*, 11 Ind. 80. The reference to the master, over the objection of appellant, was a denial of the right of trial by jury, as

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the two modes of trial were inconsistent with each other. It is thus apparent upon the face of the record that, over the objection and exception of appellant, he was denied a trial by jury, an important right secured to him by the laws of the State. This was not a technical error that may be disregarded by this court. *Shaw v. Kent, supra; Reynolds v. State, ex rel.*, 61 Ind. 392.

For this error the judgment must be reversed. The fact that upon another trial the case may be tried without a jury, is not a sufficient consideration to justify a disregard of the error below and an affirmance of the judgment. Other questions are discussed by counsel, but it is not necessary that we should notice them in this opinion. Without affecting the sale of the real estate by the commissioners or the disposition of the proceeds made by them under the orders of the court, the judgment is reversed, with costs.

Filed Sept. 1, 1884.

 No. 10,577.

DURBIN ET AL. v. HAINES.

SUPREME COURT.—Certiorari.—Notice.—Practice.—A motion in the Supreme Court for a certiorari, after submission, will be heard after ten days' notice under rule 37, though the notice specify an earlier day.

EXECUTION.—Lien.—Personal Property.—Chattel Mortgage.—A writ of *vendi. exponas*, with a command to make any part of the judgment unsatisfied by the property mentioned in the writ, by levy on any other property of the defendant, is a lien from its receipt by the sheriff upon personal property of the defendant, subject to execution, within the county, prior to a chattel mortgage thereon afterwards executed.

SAME.—Exemption.—An execution in the hands of a sheriff is not a lien where the defendant has no property save what he may claim as exempt from execution by schedule.

From the Ripley Circuit Court.

E. P. Ferris, W. W. Spencer, J. S. Ferris, S. M. Jones and H. C. Jones, for appellants.

J. B. Rebuck, for appellee.

BLACK, C.—The appellee brought suit upon a promissory note made to him by the appellant Durbin, and to foreclose a chattel mortgage executed by the maker to the payee to secure the payment of said note, it being alleged that the other appellants, William Wheeler, Henry Weber, sheriff of Ripley county, and Francis Adkinson, claimed some interest in the mortgaged property, but that they had no interest as against the appellee.

Durbin made default. Adkinson pleaded that he had a mortgage on the same property, but that his lien was junior to that of the appellee. Wheeler and Weber answered jointly by general denial, and they separately filed affirmative pleadings, to which demurrers of the appellee were sustained.

The court found and rendered judgment against Durbin on the note, and against all the defendants for the foreclosure of the mortgage.

The record as first brought to this court showed a return of the sheriff indicating that there was no service of process upon Durbin; and it was assigned as error that the court had not jurisdiction of his person. A copy of the sheriff's return, brought up by *certiorari* since the submission of the cause, shows service on Durbin. The notice of the appellee's motion, on which this *certiorari* was awarded, was served on an attorney for the appellants on the 2d of February, 1884, and notified him to appear to said motion on the 5th of said month. The *certiorari* was awarded on the 12th of said month. It is contended for the appellants that the service of said notice was insufficient, and that as the appellants did not appear to the motion, the order made thereon and the return to the *certiorari* should be disregarded. Rule 37 of this court is as follows: "No motion for a *certiorari* to correct the record in a submitted cause, will be entertained, unless the opposite party or his attorney shall have had ten days' notice in writing of the intended motion." Before the adoption of this rule, it was the practice to allow a *certiorari* to go without notice, after the submission of the cause, to supply a diminu-

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tion of the record. *Clark v. Wright*, 67 Ind. 224. Under this rule, the court will entertain the motion at any convenient time after the opposite party or his attorney has had ten days' notice in writing, though a day prior to the expiration of such period has been designated in the notice, as in this instance.

The pleadings to which demurrers were sustained presented a question, the facts involving which were in substance as follows: On the 18th of November, 1879, the appellant Wheeler recovered a judgment in the Ripley Circuit Court, against said Durbin and one Hunter, for \$598.40. On December 31st, 1879, an execution was issued on said judgment, and the sheriff, on that day, after demanding personal property of the defendants, levied said writ, by their direction, on certain land of said Hunter in said county. The sheriff advertised said land for sale on the 26th of June, 1880. On that day, Durbin paid \$200 on the execution, and the sheriff, on the same day, returned said execution unsatisfied, with his doings thereon. On the 7th of December, 1880, the clerk issued an execution reciting the former levy and return, and ordering the sheriff to make the money due on said judgment out of the property levied on, and, if not sufficient, out of any other property of the judgment defendants subject to execution. On the 23d of May, 1881, the sheriff levied this writ on said mortgaged personal property in said county. It was alleged that on the 9th of June, 1881, said writ having expired, the sheriff returned it with his doings thereon, and asked the clerk to issue an *alias venditioni exponas*, which the clerk did on the 17th of June, 1881. On the 25th of June, 1881, the sheriff sold to Wheeler for \$175 said land, which it was alleged was largely encumbered by judgments and mortgages, and this sale left a portion of his judgment still unpaid. On the 10th of July, 1881, the sheriff, after advertisement, offered said personal property for sale, but failed to sell it because of the appellee's claim thereon under his mortgage.

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It was asked that Wheeler's writ be declared a lien superior to said chattel mortgage. Section 453 of the code of 1852, in force at the times referred to in these pleadings, provided, as does section 740, R. S. 1881, "When any property levied on remains unsold, it shall be the duty of the sheriff, when he returns the execution, to return the appraisement therewith, stating in his return the failure to sell and the cause of the failure."

Section 454 of the code of 1852 provided: "The lien of the levy upon the property, shall continue, and the clerk, unless otherwise directed by the plaintiff, shall forthwith issue another execution, reciting the return of the former execution, the levy and failure to sell, and directing the sheriff to satisfy the judgment out of the property unsold, if the same is sufficient; if not, then out of any other property of the debtor, subject to execution."

The section last quoted has been amended by section 741, R. S. 1881, so as to provide that the lien of the former levy shall continue only during certain designated periods unless another execution has been issued, and so as to provide that the latter shall be issued by the clerk when directed by the plaintiff. See *Zug v. Laughlin*, 23 Ind. 170.

When the mortgage in suit was executed, an execution such as was provided for by said section 454 of the code of 1852 was in the hands of the sheriff, and the land levied on was sold afterward.

A *venditioni exponas* without a *feri facias* clause is merely an order to sell property already levied on, and it affects no other property. The question to be decided is, whether or not the writ of *venditioni exponas* with a *feri facias* clause provided for by our statute constitutes a lien on other property of the judgment debtor before that on which the former writ was levied has been exhausted under the later writ.

It is true that the *feri facias* clause is conditional, and that the sheriff has no authority, by virtue of such a writ, to levy on other property, without first ascertaining the fact that

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such "unsold property" is not sufficient to satisfy the judgment. No distinction is made by the statute between cases in which the property must be appraised before sale and those in which no appraisal is required; and, without regard to the actual value of the unsold property, the writ is to contain the conditional clause, and the extent to which such property is sufficient is to be realized by the sheriff before he is authorized to proceed against other property.

In North Carolina, it has been held that the special *fi. fa.* clause in writs of *venditioni exponas* does not give them priority as to personal property not levied upon by former executions. *Dunn v. Nichols*, 63 N. C. 107; *Canaday v. Nuttall*, 2 Ired. Eq. 265.

In our State, the various kinds of executions, their requisites, and the time from which they become liens on chattels, are provided for by statute.

Section 686, R. S. 1881, provides, as did section 413 of the code of 1852: "When an execution against the property of any person is delivered to an officer to be executed, the goods and chattels of such person within the jurisdiction of the officer shall be bound from the time of the delivery."

The writ provided for in said section 454 was therein denominated, as that provided for in said section 741, R. S. 1881, is therein styled, "another execution," and the former was, and the latter is, "an execution against the property of" a person; and by the terms of our statute, therefore, such a writ bound the goods and chattels of the persons against whom it was directed, within the jurisdiction of the officer, from the time of the delivery to the officer.

It may seem unreasonable that an execution should be a lien on chattels before they can be levied upon thereunder; and the tendency of modern statutory provisions on the subject of executions is to postpone the commencement, or limit the effect of the lien, or to abolish it. But for an execution to be a lien on property without present authority of the officer to levy thereon, is no anomaly. Upon the finding of an issue

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of suretyship in favor of the surety, the court makes an order directing the sheriff to levy the execution first upon and exhaust the property of the principal before a levy shall be made upon the property of the surety, and the clerk indorses a memorandum of the order on the execution; and a levy of the property of the surety may be enjoined, if made before the property of the principal has been exhausted. *Johnson v. Harris*, 69 Ind. 305. But it would not be claimed that until the property of the principal has been exhausted, the execution does not become a lien on the surety's property. And when, there being an express written agreement for the payment of a sum of money secured by a mortgage, the court, upon foreclosure, directs in the order of sale that the balance due on the mortgage and costs which may remain unsatisfied after the sale of the mortgaged premises, shall be levied of any property of the mortgage debtor, the sheriff to whom the copy of the order of sale and judgment is issued proceeds to sell the mortgaged premises as upon execution, and if any part of the judgment, interest and costs remains unsatisfied, he is to proceed forthwith to levy the residue of the other property of the defendant. Sections 1099, 1100, R. S. 1881.

In *Willson v. Binford*, 54 Ind. 569, it was said by **WORDEN**, C. J.: "We see no reason why such an execution" (issued on a judgment of foreclosure) "should not be a lien upon the goods and chattels of the defendant therein, as provided for by" said section 413 of the code of 1852. That question was not decided in that case, and we do not mean to decide it here. The writ which was in the hands of the sheriff when the chattel mortgage involved in the case at bar was executed, was an execution against property by the definition of the statute, and the statute made executions against property liens from the time of their delivery to the officer.

One of the paragraphs pleaded by the appellant Wheeler as his second separate answer, besides alleging facts substantially as above set out, alleged that Durbin was insolvent, and had no property subject to execution, and that on the 23d

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of May, 1881, he left the State, leaving the property in suit in said county.

If said mortgagor, at the time of executing the mortgage, had no property subject to execution, as thus alleged, the mortgagee could hold the property against the execution, for Durbin could dispose as he pleased of his property, which, in fact, was not subject to execution. *Godman v. Smith*, 17 Ind. 152; *Terrell v. State, ex rel.*, 66 Ind. 570. There was no error, therefore, in sustaining the demurrer to this paragraph. But the court erred in sustaining the demurrers to the first separate answer of Wheeler and the separate answer of Weber.

PER CURIAM.—It is ordered, that the judgment against the appellants Durbin and Adkinson be affirmed, at their costs, and that the judgment be reversed as to the appellants Wheeler and Weber, at the costs of the appellee, and the cause is remanded with instructions to proceed as indicated in the foregoing opinion.

Filed Jan. 10, 1885.

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99	469
169	642

DEED.—*Infant Married Woman.*—If a married woman, while an infant, signs and acknowledges, with her husband, a deed for her real estate, and authorizes him to deliver it, and he delivers it with her consent after she becomes an adult, such deed can not be avoided by her on account of infancy.

SAME.—*Husband as Agent.*—A husband may act as his wife's agent, and such agency may be conferred before he acts, or his acts may be subsequently ratified.

SAME.—*Quieting Title.*—*Complaint.*—A complaint to quiet title, alleging that the defendant who was once seized of the land gives out in public speeches falsely, that her conveyance thereof was made when she was an infant, and that she was still the owner, whereby the plaintiff's title was clouded, is good on demurrer.

SAME.—*Married Woman.*—*Evidence.*—Upon a complaint to quiet title, alleging the facts to be that the plaintiff, a married woman, was seized of the land and executed a conveyance thereof while an infant, in which her husband joined, and that she had disaffirmed the deed, is not supported by proof that the deed was ineffectual for want of such a certificate of acknowledgment as the statute required to give validity to the deed of a married woman.

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From the Hamilton Circuit Court.

A. F. Shirts, G. Shirts and W. R. Fertig, for appellant.

D. Moss, R. R. Stephenson, H. A. Lee, W. Neal and J. F. Neal, for appellee.

COLERICK, C.—This action was brought by the appellant against the appellees to quiet her title to certain real estate in Hamilton county, Indiana. Her husband, John F. Sims, united with her, as a plaintiff, in the institution of the action, but during its pendency he died, and, by reason thereof, it was thereafter prosecuted by her alone. It was averred in the complaint that on the 24th day of July, 1844, and prior to that time, the appellant was the owner in fee simple of the west half of the southwest quarter of section six (6), township nineteen (19) north, of range five (5) east, containing eighty acres; that on said day she, with her said husband, executed a deed to Henry Bardoner, purporting to convey said land to him, and that he, by divers mesne conveyances, conveyed the same to the appellee Martha Smith; that at the time of the conveyance to Bardoner the appellant was a minor, under the age of twenty-one years, and then was, and ever since had been, the wife of said John F. Sims; that on the — day of March, 1881, before the commencement of the action, she and her husband disaffirmed the conveyance to Bardoner on account of her minority, and notified the appellees of the fact; that the appellees were denying the right of the plaintiffs to disaffirm said deed, and asserting that they were the absolute owners of said real estate. Wherefore the plaintiffs prayed that said deed be declared void as to the appellant, and that her title to said land be quieted, etc.

To this complaint a demurrer, alleging insufficiency of facts to constitute a cause of action, was sustained, to which ruling the plaintiffs excepted, and refusing to amend their complaint, final judgment, on demurrer, was rendered against them, from which they appealed to this court, where the judgment was reversed. It was then held by this court that the complaint was sufficient. See *Sims v. Smith*, 86 Ind. 577. On the re-

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manding of the cause to the court below, the appellees filed an answer of general denial to the complaint, and also filed a cross complaint, in which many facts were averred, for the purpose of showing that the appellant had, by certain acts, therein recited, ratified and confirmed the deed so executed by her and her husband to Bardoner, or that she was, by said acts and by omissions to act, bound, at least, by an estoppel *in pais* against disaffirming it, and it was also therein averred that the appellant was, in public speeches, declaring that she was the owner of said real estate, which declarations were false, and cast a cloud upon the appellees' title to said real estate, and prayed that the title of the appellee Martha Smith to the land might be quieted as against the appellant, etc.

A demurrer to the cross complaint was overruled, and thereupon an answer thereto in three paragraphs was filed, to the second and third paragraphs of which a reply in denial was filed. The first paragraph of said answer was a general denial. The issues so formed were tried by the court, who made a special finding of the facts in the case, and its conclusions of law thereon, as follows:

"SPECIAL FINDING.

"This cause having been submitted to the court for trial, the court, at the instance and request of the plaintiffs, with the view of excepting to the conclusions of law, finds the facts specially in said cause as follows:

"That on the 24th day of July, 1844, the plaintiff, being the owner in fee simple of the lands described in the complaint, together with 360 acres of other lands, signed and acknowledged with her husband, John F. Sims, a warranty deed for all of said lands for the purpose of conveying said lands to one Henry Bardoner, in exchange for another body of land in the neighborhood then owned by said Henry Bardoner; that she intrusted her said husband with said deed for the purpose of delivering the same to said Henry Bardoner, who resided in Hamilton county, Indiana. She, the plaintiff, and her husband, then resided in Clinton county, Indiana; that

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he, said husband, came to Hamilton county and met said Bardoner at Esquire Hall's, in Hamilton county, on the 1st day of August, 1844, when said Bardoner and his wife signed and acknowledged a deed for their said lands to said John F. Sims; but by reason of some imperfection in said deed from the Sims, said Bardoner failed or refused to accept the same at that time, and said John F. Sims returned to his home in Clinton county, where the plaintiff was then living with him, and in April, 1845, the said Sims returned to Hamilton county with said deed of himself and wife for said lands of his said wife, and said Bardoner thereupon accepted the same, and said exchange of lands was thereupon consummated; and said Henry Bardoner thereupon took possession of the lands in controversy, along with the other lands mentioned in said deed, and he and his grantees, including the defendants in this suit, have held and had the open, notorious, uninterrupted and adverse possession and control thereof ever since, claiming to be the absolute owners thereof, with the knowledge of the plaintiff; that she has resided in the immediate neighborhood of said lands ever since said trade, living within from one to six miles all the time, and knowing that said Bardoner and his grantees were constantly improving them; that the lands that said Bardoner conveyed to said Sims in said exchange were of equal value at the time of the exchange with the lands he had received from the plaintiff; that the plaintiff knew that the deed to said lands had been made to her husband, and made no objection thereto; that in 1847, while living on said lands so received in exchange, she expressed herself as well satisfied with the trade; that the wild lands they had traded were of no use to them, and that the farm they received was well improved, and her husband could make a good living upon it, while he was not able to clear and improve the wild lands; that her step-father and former guardian, after discovering that her said deed had been signed by her while a minor, informed her that her conveyance was not good; and after consultation with her husband upon the

same subject, she thereafter, on divers occasions, expressed herself well satisfied with the trade in the manner aforesaid, and consented to the transfer of the property so received from Bardoner in the manner hereafter found, and did not disaffirm said deed until 1880 and 1881, which the court finds to be an unreasonable delay under the facts and circumstances in the case. The said disaffirmance was in writing, the first signed by herself and the second by herself and husband. The disaffirmance was upon the alleged ground of her infancy at the time of the execution of said deed; that the plaintiff was a minor when she signed and acknowledged the said deed for said lands to Henry Bardoner on the 24th day of July, 1844, but she became of the age of twenty-one years on the 8th day of November, 1844; was, consequently, over twenty-one years of age when the deed was delivered; that the plaintiff was married to John F. Sims previous to the execution by them of said deed to Bardoner, and has remained his wife until his death, which occurred since the commencement of this suit; that the plaintiff had no knowledge of the actual time of the delivery of said deed to Bardoner by her husband, but she authorized him to deliver it, but no specified time was given in which it should be delivered.

“The court further finds that the plaintiff, after she arrived at the age of majority, and had been informed that a deed of real estate made by a person under twenty-one years of age could be avoided, and had consulted with her husband and step-father, who had been her guardian, about the year 1847, concluded to not then attempt to disaffirm said deed, but allowed the lands received from Henry Bardoner for the plaintiff's lands, and deeded to her husband, John F. Sims, to be sold by her husband to her step-father, and joined in a deed therefor to her step-father in 1853, and allowed her husband to purchase another farm with the proceeds and take the deed therefor in his own name, and continue to own and use the same until 1877, when he sold it, and the plaintiff joined in a deed therefor and permitted her husband to use the proceeds

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in paying his debts, thus ratifying and confirming the transfer of the land to Henry Bardoner by deed made and acknowledged July 24th, 1844, and delivered to Henry Bardoner by John F. Sims in 1845.

"The plaintiff was, during the time of her residence with John F. Sims as his wife, a woman possessed of sufficient mental force to attend to ordinary household duties and do the shopping for her family and care for her children and keep her house with reasonable and ordinary skill, except during a severe sickness in 1857, when she was so affected as to be delirious for several weeks, and it was three or four months before she recovered her health.

"The rent for the lands during the period it has been occupied by Bardoner and his grantees has been equal to, or in excess of, improvements made on the lands.

"From the facts above found the court makes the following conclusions:

"1st. That the plaintiff take nothing by her complaint.

"2d. That the defendant Martha Smith have her title quieted as prayed for in her cross complaint.

(Signed) "JAMES O'BRIEN."

The appellant excepted to the conclusions of law, and thereupon, over a motion for a new trial, judgment was rendered in favor of the appellees. The errors assigned by the appellant are:

1st. That the court below erred in its conclusions of law upon the facts specially found.

2d. That the court erred in overruling the demurrer to the cross complaint.

3d. That the court erred in overruling the motion for a new trial.

The sole ground on which the appellant, in her complaint, assailed the validity of the conveyance in dispute, was, that at the time of its execution she was an infant. To entitle her to a judgment in the action, it was essential for her to establish, by proof, that fact. The court, in its special finding of

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the facts, found that she was an infant at the time she signed and acknowledged the deed, but was an adult at the time of its delivery. Upon the facts so found, the court, as a conclusion of law thereon, correctly declared that the appellant was not entitled to the relief demanded by her. It is well settled by the authorities that the delivery of a deed is a part of its execution (*Gray v. State*, 9 Ind. 25), and such delivery is essential to pass the legal title to the property. *Fletcher v. Mansur*, 5 Ind. 267. A deed takes effect from its delivery. *Hoadley v. Hadley*, 48 Ind. 452. And it may be written, signed, acknowledged and certified, and still be inoperative for want of delivery, whether the grantor be an infant or an adult. *Burkholder v. Casad*, 47 Ind. 418. The alleged infirmity of the deed in question grew out of the appellant's supposed disability of infancy, and not of coverture. So, if the first disability did not exist, the second could not overthrow the appellee's title. *Buchanan v. Hubbard*, 96 Ind. 1. The language used by this court in the case last cited may be appropriately applied to this case. It was there said: "It is assumed by the appellee's counsel that although the deed was made on the 3d of October, the contract was not complete until the 15th of that month, when possession was delivered, and that as Mrs. Buchanan was of age at that time she can not now avoid the deed. We are strongly inclined to agree with counsel that if the contract was not complete until the 15th of October, and was then consummated by the voluntary delivery of possession, the deed must be sustained. There is much reason for this conclusion. The deed was not voidable because the grantor was a *feme covert*, but because she was an infant, and if the contract was not executed until after Mrs. Buchanan arrived at full age, and was then consummated, the fact that she was a *feme covert* will not impair its force." In this case the execution of the deed was not consummated until the deed was delivered, and as it was not delivered, or the possession of the property conveyed surrendered to the appellee, as found

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by the court, until after the appellant became an adult, the deed was valid, although she was then a *feme covert*. The appellant, when she signed and acknowledged the deed, allowed her husband to control its delivery and authorized him to deliver it, but no time was specified for its delivery. For that purpose he acted as her agent, and his act in subsequently delivering it was effective against her. The court specially found that after the delivery of the deed, and after taking possession of the land that was received in exchange for the property in dispute, the appellant "expressed herself as well satisfied with the trade," which indicated a ratification by her of the act of her husband, in consummating the trade by the delivery of the deed. A husband may act as the agent of his wife, and his authority to so act may be given by her to him before he acts, or his acts may be afterwards ratified by her. *Lichtenberger v. Graham*, 50 Ind. 288.

It is insisted by the appellant that the facts found by the court in its special finding were not sufficient to operate as an estoppel *in pais* against her, so as to preclude her from avoiding the deed, which, she asserts, was executed by her while an infant. In view of the fact, found by the court, that she was an adult at the time of the delivery of the deed, which was the consummation of its execution, it is unnecessary and would be unprofitable, in this case, for us to consider and determine what acts or omissions to act will prevent a person, after becoming an adult but still laboring under the disability of coverture, from disaffirming a conveyance executed by her while an infant.

The appellant insists that the conveyance, as to her, was void, because the certificate of acknowledgment thereto attached was not in accordance with the requirements of the statute then existing. No such question was presented to the court below for its consideration, either by averments in the pleadings or by proof adduced at the trial. The appellant, in her complaint, assailed the validity of the deed solely upon the ground that she was an infant at the time of its execu-

tion, and the facts therein averred as to the invalidity of the deed were predicated alone upon her supposed infancy at that time, and her right, by reason thereof, to disaffirm the conveyance, and no other question was presented by the answer or cross complaint. It is well settled by the decisions of this court that "In order to bring the parties to an issue, it is necessary to require them to make their pleadings conform to some definite theory, and to be sufficient upon that theory. The theory is to be determined from the general scope and averments of the pleading, and not from isolated or detached averments. Our cases have steadily maintained the rule that a pleading must proceed on a definite theory, must be good on that theory, and must be judged by its general tenor and scope." See *Western Union Tel. Co. v. Reed*, 96 Ind. 195, and the cases there cited. Guided and controlled by the rule announced and adhered to in these cases, we must hold that no question involving the validity of the deed in dispute, by reason of the character of its acknowledgment, was presented to the court below for its consideration, and, therefore, none is presented for our review.

It was averred in the cross complaint that the appellant was giving out in speeches, among other things, "that she was an infant when she and her said husband executed said deed to said Bardoner, * * * which statements are false, and made for the fraudulent purpose of casting a cloud on the title of the said Martha (appellee) to the land in controversy," etc. Wherefore the said Martha prayed that her title to said land be quieted as against the appellant, etc. These averments in the cross complaint rendered it, on demurrer, sufficient. If other averments therein, tending to establish an estoppel *in pais* against the appellant from asserting title to the property in dispute, were, as claimed by her, immaterial and irrelevant, it was her right and privilege to have had the same, on motion, stricken out. No such motion was made. The demurrer was properly overruled by the court.

The reasons assigned in support of the motion for a new

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trial are many in number, but the only material ones, in view of the conclusion which we have reached, as above expressed, question the sufficiency of the evidence to sustain the special finding of facts by the court. We have examined the evidence, which is in the record, and find that it tends to sustain the same, and, therefore, we can not disturb the finding on the weight of the evidence.

As the judgment was clearly right on the merits of the case, and as no error affecting the substantial rights of the appellant occurred in the proceedings of the court below, the judgment ought to be affirmed.

PER CURIAM.—The judgment of the court below is affirmed, at the costs of the appellant.

Filed Jan. 9, 1885.

No. 11,945.

DAMRON v. THE PENN MUTUAL LIFE INSURANCE COMPANY ET AL.

LIFE INSURANCE.—Assignment of Policy.—Married Woman.—A life policy upon the life of the husband taken by him payable to his wife or her assigns is a chose in action, her property, and may be assigned by her, if the law of her domicil, as in Illinois, authorizes her to sell and convey her property, and in such case upon the death of husband the assignee is entitled to the proceeds according to the terms of the assignment.

SAME.—Agreement.—Statute of Limitations.—Where such assignment is made to secure a debt of the husband, upon agreement that no proceedings shall be taken to enforce collection thereof during the husband's life, the statute of limitations does not commence to run against the debt so secured from the assignment, but from his death.

From the Gibson Circuit Court.

A. P. Hovey and G. V. Menzies, for appellant.

A. Gilchrist, C. A. DeBruler, W. P. Edson, E. M. Spencer and H. C. Pitcher, for appellees.

BICKNELL, C. C.—This suit was commenced in March, 1884, in the Posey Circuit Court, and was taken by change

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of venue to the Vanderburgh Circuit Court, and thence to the Gibson Circuit Court, where a judgment was rendered for the appellees, from which this appeal was taken.

The appellant, the widow of Uriah G. Damron, brought the suit against the said insurance company upon its policy of insurance on the life of her said husband for \$2,500, executed on January 30th, 1876, and payable to the appellant. The appellees, Cook, Dieterlie, Noel and Pitcher, were made defendants, as claiming some interest in the policy under an assignment. The complaint alleged that said assignment was void, because of the plaintiff's coverture, and prayed for judgment on the policy.

The insurance company paid into court the amount due on the policy, to await the result of the litigation between the plaintiff and the other defendants, and was thereupon discharged from further liability. The issues joined were submitted to the court for trial, and the court made a special finding of the facts, and stated conclusions of law thereon in favor of the appellees, to which conclusions the appellant excepted.

The appellant has assigned several errors, but in her brief has discussed only the alleged errors in the conclusions of law, and has presented for consideration the following questions only:

1. Was the assignment of the policy by Mrs. Damron valid?
2. Is the statute of limitations of six years a bar to the accounts.

The court found substantially that the policy of insurance on the life of the said Uriah G. Damron for \$2,500, payable within sixty days after notice and proof of his death, to his wife, the appellant, her executors, administrators or assigns, was executed by the said insurance company on April 30th, 1873, and that the annual premium payable thereon was \$126.25; that when the policy was executed said Damron and wife were residents of Evansville, Indiana, and said insurance

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company was a corporation of Pennsylvania doing business in Indiana; that said Uriah Damron afterwards became indebted to Henry A. Cook \$1,015.60, and to John Dieterlie \$154.30, and to William Noel \$164, and to Henry C. Pitcher \$400, and that afterwards, on February 9th, 1877, said Damron and wife being then residents of Illinois, and Henry A. Cook a resident of Indiana, and said Damron being still indebted as aforesaid, and said Cook being his surety in the further sum of \$200, and interest at 10 per cent. since August 12, 1876, said Damron and wife endorsed upon said policy of insurance the following assignment thereof to said Henry A. Cook:

“MCLEANSBORO, Illinois, February 9th, 1877.

“Policy No. 14,791. For value received we hereby assign, transfer and set over all our right, title and interest whatsoever of, in and to policy No. 14,791, on the life of Uriah G. Damron in the Penn Mutual Life Insurance Company of Philadelphia, to which this assignment is attached, unto Henry A. Cook, Esq., of Evansville, Ind., in trust: *First.* To pay himself and John E. Dieterlie, and William J. L. Noel and Henry C. Pitcher, of Mount Vernon, Indiana, on account of U. G. Damron, any indebtedness to them, or either of them, existing when the policy becomes a claim; *Secondly.* To pay the remainder, if any, to Mrs. Cecilia E. Damron, wife of the insured, her executors, administrators or assigns, with full power to said trustee to surrender said policy to the said company, if said company consents thereto, for paid-up insurance, and without any liability on the part of said company to see to the proper discharge of the trust, or of any part thereof. Witness our hands and seals the day and year above written. (Signed) “URIAH G. DAMRON.

“CECILIA E. DAMRON.

“Witnesses present: Frank Ritchey, Geo. Phillips.

“Approved and recorded 16th day of March, 1877, without guarantee on the part of the company as to the sufficiency or validity of the transfer. Ent'd B. 2, page 240.

“JAMES WEIR MASON, Actuary.”

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And on said day Cecilia, with the consent of her husband, delivered said policy to the said Henry A. Cook; that at the time of said assignment the said Uriah was without means to pay his debts or the premiums on the policy; that said Cook agreed, as the consideration for said assignment, to and with the said plaintiff and the said Uriah, that he Cook would pay or cause to be paid all premiums upon said policy as they became due, and would not, in any way, press the said Uriah in his lifetime for the collection of said debts, or for the collection of any sum he might be compelled to pay for the said Uriah as his surety, but would give time on all such debts until the death of said Uriah, and upon his death would look solely to the proceeds of said policy for the payment of any sum that might be due him on account thereof, when said policy became a claim against the company. Said Cook also agreed to and with the plaintiff and said Uriah, that after paying himself, John Dieterlie, William Noel and Henry C. Pitcher, the indebtedness that might be due them, or either of them, when said policy became a claim, on account of said Uriah, he would pay the excess, if any, collected by him on said policy to the said Cecilia E. Damron; that after the execution of said assignment said Cook, in April, 1877, paid as surety for said Uriah the sum of \$217.50, and never pressed him in his lifetime for the payment of any of the foregoing indebtedness; that said Cook also paid as premiums on said policy the sum of \$653.65, of which \$29.68 were repaid him by said Pitcher, and \$10.42 were repaid him by said Dieterlie; that no part of any of the indebtedness aforesaid of said Uriah has ever been paid to said Cook, Dieterlie or Pitcher, but that said Noel's claim should be credited with \$100, on account of a gold watch and chain received by him from said Uriah in 1876; that at the date of said assignment there was a statute of the State of Illinois as follows: "A married woman may own in her own right real and personal property obtained by descent, gift or purchase, and mortgage,

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sell and convey the same to the same extent and in the same manner that the husband can property belonging to him."

At the time of said assignment, it was also the law of Illinois that a life insurance policy on the life of a husband, payable upon his death to his wife, is her sole and separate property, and she may sell and assign it or pledge it as security for her husband's debts, and an assignment by her for that purpose will be binding upon her, and she can not repudiate it after the death of her husband.

After said assignment said Uriah removed to Mount Vernon, Indiana, and became a resident there, and died there on May 28th, 1883. Due proof was made of his death; the full amount due from said insurance company on said policy and paid into court was \$2,429.33. There is due said Henry Cook, on account of premiums paid, \$766.15, including interest at six per cent. There is due on account of the premiums paid by Henry C. Pitcher, including interest, \$41.08. There is due the said John Dieterlie for premiums paid and interest, \$14.47. There is due the said Henry A. Cook on the indebtedness aforesaid other than for premiums paid, \$1,962.60, of which \$558.95 was due on open account on January 1st, 1877, for goods sold in 1876. There is due said John Dieterlie on open account, \$70.35, and the indebtedness to him, not including the premiums paid by him, is \$178.56. The indebtedness to the said William Noel is \$93.44. There is due to the said Henry C. Pitcher, not including the premiums paid by him, \$400, and he, before the death of said Uriah, executed a written assignment of all his interest in said policy to the plaintiff, Cecilia E. Damron, and delivered the same to the said Henry A. Cook.

Upon the foregoing facts the court stated the following conclusions of law:

First. The assignment of said policy is valid and binding as against the said Cecilia E. Damron.

Second. At the commencement of this suit said Henry A.

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Cook was lawfully in possession of said policy and was authorized to collect the same.

Third. That the sums of money due as aforesaid upon open account are not barred by the statute of limitations.

Fourth. This conclusion states that the sum of \$2,429.33, paid into court as aforesaid, should be distributed to the said Cook, Dieterlie, Noel and Cecilia Damron in proportion to the amount of their claims aforesaid, stating the sums to be paid to each.

Fifth. That the plaintiff, Cecilia E. Damron, has no interest in said policy or in the money paid into court, except as the assignee of the interest of said Henry C. Pitcher.

A policy of insurance is a chose in action governed by the same principles applicable to other agreements involving pecuniary obligations.

The present policy was payable to the appellant, her executors, administrators or assigns. It was, therefore, intended to be assignable.

In *Hutson v. Merrifield*, 51 Ind. 24, this court said: "The party holding and owning such a policy, whether on the life of another or on his own life, has a valuable interest in it, which he may assign, either absolutely or by way of security, and it is assignable like any other chose in action."

In *Pence v. Makepeace*, 65 Ind. 345, it was held that "An insurance policy, issued upon the life of a husband for the benefit of his wife, is her property, and an effectual assignment and delivery thereof to another, even during the lifetime of the husband, can be made only by her."

In *Wilburn v. Wilburn*, 83 Ind. 55, this court said: "In truth, the policy is not the property of the insured in any sense, but is the property of the beneficiary from the day of its issue, for from that time he has the whole beneficial interest." See, also, *Harley v. Heist*, 86 Ind. 196 (44 Am. R. 285); *Bushnell v. Bushnell*, 92 Ind. 503.

The interest of such a beneficiary being personal property,

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a married woman in Indiana, prior to the act of March 25th, 1879, Acts 1879, p. 160, could transfer such property with the consent of her husband. *Moreau v. Branson*, 37 Ind. 195; *Baker v. Armstrong*, 57 Ind. 189; *Paulman v. Claycomb*, 75 Ind. 64. But this power of the married woman was subject to the common law rule that a *feme covert* can not bind herself by an executory contract. *Mathes v. Shank*, 94 Ind. 501; *Parks v. Barrowman*, 83 Ind. 561. Therefore, where an assignment of such a policy was made by a married woman to secure her own executory contract, not binding upon her, it was held that the assignment itself was also invalid. *Godfrey v. Wilson*, 70 Ind. 50.

In some of the United States, the power of a married woman, in reference to the transfer of a policy of which she is the beneficiary, has been regulated and restrained by statutes, but there are no such statutes in Indiana. In 1877, the only statutory restriction upon the wife's power to transfer her separate property was, that the transfer must be made with her husband's consent. The rules forbidding a wife to encumber her separate property as security, or from entering into any contract of suretyship, are found in Acts 1879, p. 160, and Acts 1881, p. 528.

We think it very clear that in Indiana, in 1877, a married woman had the power to make, with her husband's consent, a valid assignment of a policy of insurance taken on her husband's life for her benefit, and payable to her and her assigns.

In considering the validity of exceptions to conclusions of law, the findings upon which such conclusions are founded are taken to be correct. Defects in the findings are not reached by exceptions to the conclusions of law. *Williams v. Osborne*, 95 Ind. 347. Under the findings in this case as to the law existing in Illinois, a married woman had also in Illinois, in 1877, the power to make a valid assignment of a policy of insurance of which she was the beneficiary.

The consideration of the assignment in controversy is therein stated as "value received." For value received the assign-

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ment is made to Henry A. Cook in trust, etc. In such a case it may be shown what the "value received" was. Even in a deed of real estate, the true consideration may be shown by parol to be more or less than the amount recited and acknowledged in the deed to have been received. *McDill v. Gunn*, 43 Ind. 315; 3 Washb. Real Prop. 327. So, the true consideration of a note may be shown by parol, and the existence of a written agreement showing part of the consideration will not prevent the introduction of oral testimony as to the remainder. *Everhart v. Puckett*, 73 Ind. 409. And see, also, *Hight v. Taylor*, 97 Ind. 392.

The findings in the present case show that the consideration of the assignment was:

First. The payment of the husband's debts.

Second. The promise to forbear to proceed against Uriah G. Damron, and to look solely to the policy for the payment of the debts.

Third. The agreement to pay, and the actual payment, of the premiums on the policy.

The findings state a sufficient consideration. *Hubble v. Wright*, 23 Ind. 322; *Ellis v. Kenyon*, 25 Ind. 134; *Buck v. Axt*, 85 Ind. 512; 1 Parsons Con. 440, 443. There was no error in the conclusion of law, that Mrs. Damron's assignment of the policy was valid. And we think there was no error in the conclusion that the statute of limitations was not a bar to the items of account mentioned in the findings.

The appellant claims that "as the assignment was dated on February 9th, 1877, and the accounts were then due, and as this action was commenced in 1884," the accounts were then more than six years past due. But, under the agreement, there was to be no proceeding against the debtor during his life, and he died in May, 1883. The statute was not running during the period embraced in that agreement, and, besides, the plea of the statute of limitations is a personal privilege to be asserted by the debtor only.

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We find no error in the conclusions of law. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed Jan. 8, 1885.

No. 11,668.

CINCINNATI, WABASH AND MICHIGAN RAILWAY COMPANY
v. HILTZHAUER.

RAILROADS.—*Negligence.—Pleading.*—A complaint against a railroad company for killing cattle upon a highway crossing, by reason of negligent failure to sound the whistle and ring the bell, as the statute requires, without any negligence of the plaintiff, is good.

SAME.—*Negligence of Plaintiff.—Cattle at Large.*—Where, in such case, it appears by evidence that the plaintiff's cattle were running at large, and it is not shown that there was an order of the county board allowing cattle to run at large, a verdict for the plaintiff will be set aside.

From the Grant Circuit Court.

C. Cowgill, H. B. Shiveley and C. E. Cowgill, for appellant.
J. F. McDowell and J. Brownlee, for appellee.

ELLIOTT, J.—The complaint of the appellee, omitting the formal parts, is as follows: "The plaintiff, in the month of October, 1881, was the owner of one roan cow and one black cow and one white heifer, of the aggregate value of sixty-five dollars; and at the county of Grant and State of Indiana, about four miles north of the town of Marion, at a public crossing of a highway on defendant's line of railroad, in the month of October or November, 1881, while said company was operating, by its employees, a locomotive and train of cars passed over and upon the said cattle and killed them. Plaintiff avers that said defendant by its employees was running its train of cars at a fast rate of speed at the

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time said cattle were killed and at the crossing where they were killed, and while said defendant by its employees was approaching said crossing with its locomotive and train of cars, it did, by its employees, carelessly and negligently and wilfully neglect to sound the whistle attached to said locomotive at a distance of eighty to one hundred rods from said crossing, as was required by law, and that it further carelessly, negligently, and wilfully neglected to ring the bell on said locomotive until it passed over said crossing. Plaintiff avers that by the said negligent acts and carelessness of said defendant, by its employees, said cattle were killed, all of which killing was without any fault or negligence of plaintiff."

This complaint is justly subject to criticism, but, while we may agree with the counsel for appellant in their criticism upon its general frame and its phraseology, we can not agree with them in the assertion that it does not state facts sufficient to constitute a cause of action.

It is probably true, as asserted by counsel, that a railroad company is not guilty of negligence because it does not slacken the speed of its trains at highway crossings, or because it runs over them at a rapid rate of speed. *Pierce R. R.* 406. But granting this to be the law, it does not follow that the complaint is bad, for other acts of negligence are averred.

It is charged that the whistle was not sounded until the locomotive was nearer the crossing than eighty rods, and that the bell was ~~not~~ rung until the train had passed the crossing. Our statute requires that the whistle shall be sounded and the bell rung when the "engine is not less than eighty nor more than one hundred rods from such crossing." *R. S.* 1881, 4020. In omitting to do what the law enjoins the appellant was guilty of actionable negligence.

The statute provides that the company negligently omitting to give the prescribed signals shall be liable in damages to any person that "may be injured in property or person."

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R. S. 1881, sec. 4021. The effect of this statutory provision is to clothe one whose person or property is injured with a right of action in cases where there is a negligent failure to give the signals required. We do not think the right of action exists only where a reasoning being is injured, but do think that if the negligent omission to do what the law requires causes injury to animals, a right of action accrues in favor of the owner. We find nothing in *Pierce on Railroads* opposing this conclusion. There are statements on the pages referred to by counsel which, if detached from the language with which they are associated, might possibly be regarded as lending support to appellant's position, but when considered, as they must be, in connection with the language with which they are associated, they are very far from yielding that position any support. *Pierce Railroads*, 350, 351. We do find at another place in the same book a statement diametrically opposed to the views of counsel. Thus it reads: "The omission to give signals of warning which will alarm cattle is not in itself negligence, when they are not required by statute. But when they are so required the company is liable for injuries to cattle resulting from the omission." *Pierce R. R.* 408. This statement is supported by a strong array of authority, and is, we have no doubt, a correct expression of the law. The remark of the judge who wrote the opinion in *Harty v. Central R. R. Co.*, 42 N. Y. 468, that "The sole object of this law, it seems to me, was to protect persons travelling upon the highway, at or near the crossing," must be construed in connection with the facts to which it was addressed, and interpreted by the language with which it is associated, and when this is done it becomes perfectly evident that the court had not the remotest intention of applying the remark to such a case as this, but intended to declare that the statute did not apply to persons walking on the track where there was no crossing, and did apply to travellers passing upon the highway.

Recoveries for injuries alleged to have resulted from neg-

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ligence can not be adjudged unless it appears that the injuries are attributable to the negligence. It is not enough to show that there was negligence, but, in addition to showing negligence, it must also be shown that to it the injury is traceable. Addison Torts, 36; Rorer R. R. 1009. If it be true, as counsel affirm, that the injury for which a recovery is here sought is not shown to be attributable to the negligence charged, then the complaint is bad. In our judgment this is not true. The introductory allegation is that the cattle were killed by the locomotive and cars passing over them. This is followed by the statement of the specific acts of negligence, and it is then averred that "by the said negligent acts of said defendant said cattle were killed," and this sufficiently shows the causal connection between the negligence and the injury.

There is evidence that the bell was not rung at all, and that the whistle was not sounded until the locomotive was within twenty or thirty yards of the crossing on which the cattle were struck and killed, and we can not say that the finding on this point is wrong, although the evidence of the plaintiff is strongly contradicted. Nor can we say that the facts proved were not such as warranted the inference that the negligent omission to give the signals was not the proximate cause of the killing of appellee's cattle. It is not necessary, as counsel's argument assumes, that there should be direct or positive evidence that the negligence caused the injury; it is sufficient if there are facts from which that conclusion can be drawn by inference. *Hedrick v. D. M. Osborne & Co.*, ante, p. 143.

There was no evidence introduced tending to show that an order of the board of commissioners had been entered allowing cattle to run at large, and the appellee was therefore guilty of a wrong in permitting the animals owned by her to wander about the public highways. The common law required the owner of cattle to keep them within his own close, and if they were suffered to run at large, the owner was regarded as a trespasser if they entered upon the close of

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another person. This doctrine applies to railroad companies, and they are not liable for killing cattle upon public highway crossings in cases where the owner wrongfully permits them to run at large. *Pierce R. R.* 401. Our cases are full and explicit upon this point. *Michigan, etc., R. R. Co. v. Fisher*, 27 Ind. 96; *Indianapolis, etc., R. R. Co. v. Harter*, 38 Ind. 557; *Jeffersonville, etc., R. R. Co. v. Huber*, 42 Ind. 173; *Jeffersonville, etc., R. R. Co. v. Adams*, 43 Ind. 402; *Jeffersonville, etc., R. R. Co. v. Underhill*, 48 Ind. 389; *Cincinnati, etc., R. R. Co. v. Street*, 50 Ind. 225; *Wabash, etc., R. W. Co. v. Nice, ante*, p. 152.

It is settled by many decisions of this court that where the plaintiff grounds his right of recovery upon the negligence of the defendant, he must allege and prove that he was himself not guilty of contributory negligence. This doctrine is not confined to actions for injuries to the person, but it also extends to injuries to property. *Wabash, etc., R. W. Co. v. Johnson*, 96 Ind. 40; *Louisville, etc., R. R. Co. v. Schmidt*, 81 Ind. 264; *Pennsylvania Company v. Gallentine*, 77 Ind. 322. The rule is recognized in all the cases, like the present, where cattle are negligently suffered to run at large and stray upon the track of a railroad; it is recognized in all the cases where railroad companies are sued for negligently suffering fire to escape, and it is also recognized in the cases where by the negligent construction of culverts the owners of adjoining lands were injured.

We are compelled to declare that the appellee, as the evidence shows, was guilty of contributory negligence, and must, therefore, reverse the judgment for the reason that the court erred in overruling the motion for a new trial.

Filed Jan. 8, 1885.

 Lord *et al.* v. Wilcox.

No. 11,796.

LORD ET AL. v. WILCOX.

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VENDOR'S LIEN.—*Enforcement of.*—*Complaint.*—*Demurrer.*—In a suit to enforce a vendor's lien on real estate, by the vendor against the heirs at law and personal representatives of the deceased vendee, the complaint is sufficient to withstand a demurrer thereto, for the alleged want of facts, if it be stated therein that the debt sued for is for the purchase-money, in whole or in part, of the real estate described, and that such debt remains due and unpaid.

SAME.—*Insolvency of Vendee.*—*Decree.*—Ordinarily, in such a suit, the complaint is sufficient without any averment of the vendee's insolvency, or that the vendee has no other property, subject to execution, whereof any part of the debt can be made. But where such an averment is not found in his complaint, the plaintiff is not entitled to a decree for the sale of the land in the first instance, to satisfy his debt, but only to a decree that if no other property of the defendant can be found subject to sale on execution, the land shall be sold to satisfy his debt.

SAME.—*Administrator of Deceased Vendee.*—*Proper Party.*—Where, after the death of the vendee, suit is brought to enforce a vendor's lien, the administrator of the deceased vendee is a proper party defendant, and where such vendee, at the time of his death, is possessed of other property subject to execution, his administrator is also a necessary party defendant.

SAME.—*Former Adjudication.*—*Estoppel.*—*Heir and Creditor.*—*Administrator's Petition.*—Where the vendor of real estate is an heir at law of the deceased vendee, and as such heir, and in no other character, is made a party to the petition of such decedent's administrator for an order to sell the real estate, the adjudication upon such petition will not estop the vendor, as a creditor of the decedent, from maintaining a suit for the enforcement of his vendor's lien on the real estate, for the general rule is, that judgments conclude the parties only in the character in which they sue or are sued.

SAME.—*Waiver.*—*Acceptance of Notes of Third Persons.*—*Agreement of Parties.*—Ordinarily, the acceptance by the vendor of real estate of the notes of a third party for the amount of the unpaid purchase-money is a waiver of his equitable lien on the land as a security for the payment of such purchase-money; but it is competent for the parties to agree that, by his acceptance of such notes, the vendor does not waive his equitable lien on the land, and that the land is and shall continue to be good to the vendor, as a security for the payment of the purchase-money.

PRACTICE.—*Weight of Evidence.*—*Supreme Court.*—The Supreme Court will not disturb the finding nor reverse the judgment of the trial court on the weight of evidence.

From the Madison Circuit Court.

Lord *et al.* v. Wilcox.

M. S. Robinson, J. W. Lovett and M. A. Chipman, for appellants.

H. D. Thompson and T. B. Orr, for appellee.

HOWK, J.—This was a suit by the appellee Elizabeth Wilcox against the appellants, as the heirs at law and the administrator of the estate of Ann C. Allen, deceased, for the enforcement of a vendor's lien against certain real estate in Madison county. The cause was put at issue and tried by the court, and a finding was made for the appellee in the sum of \$1,580.67, and for the enforcement of her vendor's lien on and against the real estate described in her complaint, to pay and satisfy the said sum of money and the costs of suit. Over the appellants' motion for a new trial the court rendered judgment and decree in favor of the appellee, in accordance with its finding.

Errors are assigned here by the appellants which call in question the decisions of the circuit court in overruling their demurrers to each paragraph of appellee's complaint, and in sustaining appellee's demurrer to the third paragraph of McCullough's separate answer, and in overruling their motion for a new trial.

Appellee's complaint contained two paragraphs, to each of which the appellants' separate demurrers for the want of sufficient facts were overruled by the court. In the first paragraph of her complaint, the appellee alleged that, on May 28th, 1878, she sold and conveyed by a deed of general warranty the northeast quarter of the northwest quarter of section 21, in township 19 north, of range 7 east, in Madison county, Indiana, to Ann C. Allen, then in life but since deceased, intestate, for the price and consideration of \$1,500; that Ann C. Allen was the owner, and in possession, of such real estate at the time of her death in 1880; that she left surviving her, as her only heirs at law, her children Esther Lord and Elizabeth Wilcox, her grandchildren Esther Allen, Howard Allen and Electa Allen, and her husband William

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B. Allen, who had since died intestate, leaving as his only heirs at law the aforesaid children and grandchildren; that at the time of the sale and conveyance of such real estate to her, and as an inducement thereto and part consideration therefor, the said Ann C. Allen agreed that the said purchase-money should be and remain a lien upon such real estate, and that the land should be and remain liable for the payment of such purchase-money until the same should be fully paid; that there had been paid thereon the sum of \$342, and that the residue thereof, with interest, remained due and unpaid in the sum of \$1,700; that said Ann C. Allen did not leave sufficient property at the time of her death, and her estate was not then sufficient to pay the claims against the same, and the liens and encumbrances on the real estate, of which she died seized; that the appellant McCullough, as administrator of the estates of said Ann C. Allen and William B. Allen, was wrongfully denying appellee's right to enforce her lien for purchase-money against such real estate; that her right to have and hold a vendor's lien for such unpaid purchase-money against such real estate was paramount to any right of said administrator thereto, and she made him a defendant to answer as to his right and interest in and to such real estate. Wherefore, etc.

The second paragraph of complaint is substantially the same as the first paragraph, except that it omits the averment in the first paragraph in regard to the alleged agreement of Ann C. Allen at the time of the sale and conveyance to her of the real estate.

Several objections are urged by appellants' counsel to the sufficiency of the facts stated in each of the paragraphs of appellee's complaint. Counsel say: "We submit that a complaint to enforce and foreclose a vendor's lien must state affirmatively all facts entitling the party to the equitable relief. It must clearly show that the party seeking such relief has no remedy at law; that he has taken no security or pledge of any other property and has done no act which would op-

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erate as a waiver of the equitable lien; or, if any other security has been taken, that by the express agreement of the parties the lien was not waived but retained." Counsel have referred us to no authority, and we know of none, which supports their views in regard to the facts, which must be shown in such a complaint as that of the appellees in this case. Where real estate is sold and conveyed, and the purchase-money or any part thereof remains unpaid, when these facts are stated by the vendor, he shows that he is entitled to and has the lien of a vendor in equity on such real estate, as a security for the payment of the unpaid purchase-money. If, by reason of any other facts, he has waived his equitable lien on the real estate, such facts may constitute possible matter of defence to be shown by the parties resisting the enforcement of such lien; but certainly the vendor need not negative the existence of any such facts in his complaint to enforce such lien.

Appellants' counsel also insist that appellee's complaint was bad on demurrer, because it contained no sufficient averment of the insolvency of the estate of Ann C. Allen, deceased. It was alleged substantially in each paragraph of the complaint that Ann C. Allen did not have sufficient property at the time of her death, and her estate was not then sufficient, to pay the claims against the same, and the liens and encumbrances on the real estate, of which she died seized. Whether or not these facts were sufficient to show that appellee was entitled to a decree, in the first instance, for the sale of the real estate, was a question not presented, we think, by the appellants' demurrers to the complaint; and, therefore, the complaint would have been sufficient, even if it had not contained any averment in regard to the other property of Ann C. Allen, or of her estate. In *Chandler v. Chandler*, 78 Ind. 417, it was said: "Ordinarily, in a suit to enforce a vendor's lien, the complaint is sufficient without averring that the defendant has no other property subject to execution, of which any part of the debt can be made. The only

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effect of omitting that averment is that the plaintiff will not be entitled to a decree for a sale of the land in the first instance, to satisfy his debt; his decree, in such a case, will be for the sale of the land to satisfy his debt, in the event only that no other property of the defendant can be found subject to sale on execution." In the case in hand, the averments in each paragraph of the complaint, touching the other property of Ann C. Allen or of her estate, were sufficient to show the necessity for appellee's resort to the enforcement of her vendor's lien against the real estate, in the first instance, for the payment of the unpaid purchase-money, and, therefore, were sufficient to withstand the appellants' demurrers to such paragraphs of complaint.

Finally, it is claimed that the separate demurrer of the appellant McCullough, administrator of Ann C. Allen's estate, ought to have been sustained to each paragraph of the complaint. We do not think so. It is true that the appellee did not state, nor attempt to state, in either paragraph of her complaint, a cause of action against the appellant McCullough, nor did she demand any relief against him as such administrator. She made him a defendant to her suit, that he might answer as to his right and interest, as administrator, in the real estate described in her complaint. If he was not a necessary party, he was certainly a proper party to her suit, and, therefore, there was no available error in overruling his separate demurrer to either paragraph of the complaint. "If the decedent * * * had been possessed of other property, subject to execution, at the time of his death, then it might have been claimed very properly, we think, that the administrator of his estate was a necessary party defendant to this action." *Overly v. Tipton*, 68 Ind. 410.

Appellants' counsel next complain of the alleged error of the trial court in sustaining appellee's demurrer to the third paragraph of the separate answer of the appellant McCullough, as administrator of Ann C. Allen's estate. In this paragraph of his answer he admitted the purchase by Ann C.

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Allen of appellee of the land described in her complaint, but said that theretofore, upon his proper petition, appraisal and additional bond, as such administrator, and after due notice as required by law, he was ordered and directed by the court below, as such administrator, to sell the real estate aforesaid to make assets in his hands to pay the debts of his intestate; that the appellee, Elizabeth Wilcox, was made a defendant to his said petition, and was duly notified of its pendency and of the time set for the hearing thereof, as required by law, and appeared to such petition before the order of sale was granted to him as aforesaid. Wherefore, etc.

Of this paragraph of answer appellants' counsel say: "We think this answer shows an adjudication of the appellee's right and interest in the land, and that, if she had any lien on the land, it must have been set up and litigated in the proceedings for a sale of the land, to which she was a party." It was not alleged in the answer, however, that appellee's lien was set up and litigated in the administrator's proceedings for a sale of the land, and, certainly, such lien was not necessarily involved in such proceedings. So far as the answer shows, the appellee was a party to the administrator's proceedings only as an heir, and not as a creditor, of his decedent. "As a general rule, judgments conclude the parties only in the character in which they sue or are sued. Bigelow Estoppel, 65. This general rule is, we think, applicable to the proceedings relied on as an estoppel in this case." *Elliott v. Frakes*, 71 Ind., 412; *Armstrong v. Cavitt*, 78 Ind. 476; *Compton v. Pruitt*, 88 Ind. 171. The demurrer to the third paragraph of McCullough's separate answer was correctly sustained.

Under the error assigned by the appellants upon the overruling of their motion for a new trial, it is earnestly insisted by their counsel that the finding of the court was not sustained by sufficient evidence. The first point made by counsel in argument is, that "the evidence does not show that appellee owned the land described in the complaint," and con-

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veyed by her and Andrew B. Wilcox, her husband, to Ann C. Allen. It is true that no witness testified directly to the fact that the land was the separate estate of the appellee, but it is apparent from the entire record that such fact was not in controversy, and was taken for granted, in the trial court. The appellants admitted such fact in the affirmative paragraphs of their answers, and they offered no evidence to the contrary on the trial of the cause. The parol evidence in relation to the payment of the purchase-money to the appellee tended to prove that the land belonged to her, and not to her husband, nor to her and her husband jointly. In this state of the record, we can not say that there was no evidence before the court tending to prove that appellee owned the land as she alleged, nor can we reverse the judgment for the want of such evidence.

Appellants' counsel next insist that the evidence shows that Ann C. Allen transferred and endorsed to appellee the notes of William C. Fleming for the land, and thereby waived any right to a vendor's lien, and did not, by an express agreement, retain such lien. Upon this point the evidence shows that when the appellee and her husband signed and acknowledged the deed of the land to Ann C. Allen, and before the delivery of such deed, the said Ann C. Allen assigned and transferred to the appellee, on account of the purchase-money for such land, two promissory notes each in the sum of \$729, executed by one William C. Fleming to Ann C. Allen, and endorsed and delivered to the appellee, upon her delivery of the aforesaid deed. Did the appellee, by her acceptance of the transfer of Fleming's notes, waive her vendor's lien upon the land as a security for the payment of the unpaid purchase-money? The notes were not given, nor accepted, in exchange for the land; they were not commercial paper, and hence the endorsement and transfer thereof by Ann C. Allen did not operate as a payment of her debt to the appellee for the purchase-money of the land, in the absence of an express agree-

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ment to that effect between her and Ann C. Allen. The vendor's lien upon the land was an incident of the debt, and it continued in existence until the debt shall be paid or extinguished, unless it must be said from the evidence in the record that such lien has been waived by the appellee.

In *Hiscock v. Norton*, 42 Mich. 320, it is said: "The general doctrine relative to what is understood as the vendor's lien upon realty rests on the postulate that it is not equitable for one to absorb another's wealth without recompense; and therefore, as between grantor and grantee the court will intend that the purchased estate was to be held for the unpaid purchase-money, unless circumstances are found which repel the presumption." In the case in hand, the suit for the enforcement of the vendor's lien was between the grantor and the heirs at law and administrator of the deceased grantee; and, therefore, the appellants occupy no better or stronger position than the grantee would have done if the suit had been brought against her in her lifetime. Ordinarily, no doubt, the appellee's acceptance of the notes of William C. Fleming, as a security for the payment of the whole or a part of the purchase-money, would have been equivalent to a waiver of her vendor's lien on the land. But it was competent for the parties, we think, as the appellants' counsel concede, to agree that appellee's acceptance of the Fleming notes should not be equivalent to a waiver of her vendor's lien on the land, but that the land itself, notwithstanding her acceptance of such notes, should continue to be the security for the unpaid purchase-money.

Upon this point, the evidence was as follows: "After the deed was signed and acknowledged by Mrs. Wilcox and Wilcox, there were then two notes to be transferred or assigned to Mrs. Wilcox, and either Mrs. Wilcox or Mr. Wilcox (they were all present) said this: 'Now, if Mr. Fleming does not pay, should not pay, these notes, what security have we for the payment for our land?' Mrs. Allen remarked, that the land would be good for it, and if it was not, she was good

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anyhow. The question came up, when Mrs. Allen went to sign her name on the back of the notes, * * * that was after the deed was signed. It was delivered after the notes were endorsed; they were all laid on the table there, and each one took her papers."

From this evidence the court was justified in finding, we think, as it must have done, that the parties, grantor and grantee, agreed at the time of the conveyance of the land, that appellee's acceptance of the Fleming notes should not be a waiver of her vendor's lien on the land, and that the land should be good to her as a security for the payment of the purchase-money. At all events, we can not disturb the finding of the court, on the point under consideration, upon the evidence. Of course, the endorsement of the notes by Ann C. Allen, in May, 1878, when she was a married woman, merely operated to transfer her title to the notes and did not bind her as a contract, nor subject her to the ordinary liabilities of an assignor of such paper. *Mathes v. Shank*, 94 Ind. 501.

It is also urged by appellants' counsel, that the evidence fails to show that the money could not be made out of the judgment against Fleming, but, on the contrary, shows that he still is solvent, unless compelled to sacrifice his property. Touching the solvency of Fleming, there was some conflict in the evidence; but there was evidence before the court tending to prove that he was insolvent, that an execution on the judgment had been returned unsatisfied, and that no diligence on the part of appellee would have been availing to collect the money from him. We can not disturb the finding of the court upon the evidence on this point.

It is further claimed by appellants' counsel, that the evidence shows that the account for purchase-money sued on had been merged in a judgment against Fleming, and could not be the foundation of an action. A careful examination of the record has not enabled us to discover any evidence tending to prove a merger of the account for purchase-money,

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now in suit, in any judgment against Fleming or any other person.

We have found no error, in the record of this cause, which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed Jan. 3, 1885.

 No. 9606.

HURSH ET AL. v. HURSH.

TIME.—Appeal.—Receiver.—An appeal from an interlocutory order appointing a receiver was perfected July 25th, the order having been entered July 16th.

Held, that the appeal was within ten days as required by section 1231, R. S. 1881.

MORTGAGE.—Foreclosure.—Receiver.—Practice.—In a suit to foreclose a mortgage, a receiver is appointed on motion or petition therefor, and on such application the complaint can not be questioned by demurrer or otherwise. The application may be heard on affidavits or oral testimony, and much in the discretion of the court, and an exception to granting or refusing the motion saves the question for appeal; and erroneous statements in such affidavits may be corrected by additional affidavits.

SAME.—Statute Construed.—The statute, R. S. 1881, section 1222, warrants the appointment of a receiver in a suit to foreclose a mortgage, without reference to the solvency of the mortgagor, when it appears that the mortgaged property is not sufficient to satisfy the debt, and he may be authorized to take possession of the land and crops growing thereon, though the mortgagor be at the time in possession.

From the Carroll Circuit Court.

W. C. Wilson, J. H. Adams, R. P. Davidson and J. C. Davidson, for appellants.

A. Parsons, for appellee.

COLERICK, C.—This is an appeal from an order of the Carroll Circuit Court appointing a receiver. A motion has been made in this court by the appellee to dismiss the appeal, because the same was not taken within the time required by the statute, which provides that "In all cases hereafter commenced or now pending in any of the courts of this State,

99	500
133	57

99	500
134	307

99	500
140	269

99	500
159	77

99	500
167	507

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in which a receiver may be appointed or refused, the party aggrieved may, within ten days thereafter, appeal from the decision of the court to the Supreme Court, without awaiting the final determination of such case," etc. Acts 1875, p. 117, section 2; R. S. 1881, section 1231. The record shows that the order was made on the 16th day of July, 1881. The record was filed in this court on the 25th day of July, 1881, which was within ten days after the making of the order. The appeal was taken in time, and, therefore, the motion to dismiss the appeal is overruled.

The action in which the receiver was appointed was brought by the appellee to foreclose a mortgage executed to him by the appellant Philip Hursh on a farm in Tippecanoe county, Indiana, and given to secure the payment of the unpaid balance of the purchase-money for said farm. During the pendency of the action, the appellee moved the court for the appointment of a receiver to take possession of the mortgaged property and secure the application of the rents and profits arising therefrom to the payment of the debt secured by the mortgage. In support of this motion the appellee presented affidavits of divers persons, showing, or tending to show, that the value of the property mortgaged was less than the unpaid balance of the debt secured by the mortgage, and that the appellant Philip Hursh was insolvent, and was committing irreparable injury and waste to the property; and the appellants, in opposition to the motion, presented counter-affidavits refuting, or tending to refute, the statements set forth in the affidavits so presented by the appellee; and, thereupon, the appellee was permitted by the court, over the objection of the appellants, to present additional affidavits, some by persons who had made counter-affidavits as above referred to, and in which new affidavits they explained and qualified certain material statements contained in their former affidavits, and the residue of the additional affidavits, so presented, related to the alleged insolvency of the appellant Philip Hursh. Upon this proof the court sustained the motion, and made an order

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appointing a receiver, as moved for. The following is the material part of the order: "And it is therefore ordered, that John Snyder be and he is hereby appointed receiver of the premises embraced in the mortgage described in the plaintiff's complaint, and he is directed to take possession of the same, with the growing crops thereon, and to cultivate and gather such crops, and to prevent any waste or destruction of said premises. The receiver shall retain possession of such crops until the further order of this court, but he shall not take possession of the wheat crop, which has been cut and severed from the realty, and said receiver shall not take possession of the dwelling-house, barn and out-houses on said premises, or the orchard and grounds surrounding the dwelling-house, not exceeding ten acres, but shall leave the defendants in possession thereof." The appellants moved the court to modify the order so as to exclude therefrom the growing crops on said mortgaged premises, which motion was overruled. From the order so made the appellants have appealed to this court. The questions presented for our consideration are thus stated by the appellants in their brief:

"1. The court below erred in the appointment of a receiver, because it was not alleged in the complaint, nor established by the proof, that the land covered by the mortgage was inadequate for the payment of the plaintiff's debt.

"2. The court below erred in the appointment of a receiver, because the insolvency of the defendant Philip Hursh was not established by the proof.

"3. The court below erred in the appointment of a receiver, because it was shown that the defendant Philip Hursh was in the actual possession of the real estate in controversy by himself, and not by a tenant.

"4. The court below erred in refusing to modify the order for the appointment of a receiver, so as to exempt from the effect thereof the growing crops of the defendant on the real estate in his actual possession."

We will consider these questions in the order presented by the appellants:

First. The application for the appointment of a receiver in this case was granted by the court, on motion of the appellee, founded upon affidavits presented by him in support thereof.

The sufficiency of a complaint in an action like this can not be assailed in this court on an appeal from an interlocutory order merely of the court below, appointing, on motion, a receiver to act therein during the pendency of the action. See *Main v. Ginhert*, 92 Ind. 180; *Pouder v. Tate*, 96 Ind. 330. In the case first cited, it was held by this court that on such an appeal no question can be presented as to the sufficiency of the complaint, as the pleadings in the action, and the proceedings therein, except those which immediately led to the appointment of a receiver, are left open and undetermined, and consequently still within the control of the court below. And in the case last cited it was said: "The appellant offered to file a demurrer to the appellee's petition for the appointment of a receiver, but was not permitted to do so. An application for the appointment of a receiver pending litigation is made upon petition or motion. Affidavits and counter-affidavits may be filed, or oral testimony heard, and an exception taken to the sustaining or the overruling of such petition or motion presents the question of the correctness of the ruling. This, we think, is the correct practice." Adhering to these decisions, and applying to this case the rule established by them in this State, we can not consider the sufficiency of the complaint. The affidavits presented by the appellee in support of his motion were offered for the purpose of showing the insolvency of the appellant Philip Hursh, and that the mortgaged property was inadequate for the payment of the debt secured by the mortgage, and the counter-affidavits were presented in contravention of the statements set forth in the affidavits filed by the appellee, and thereby issues which merely presented questions of fact for the determination of the court below were formed. Upon questions of

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fact so presented, we can not disturb the conclusion reached by the trial court. See *Pouder v. Tate, supra*; *Long v. State*, 95 Ind. 481, and the cases there cited.

Second. It has been decided by this court that it is not necessary, on an application for the appointment of a receiver in a case like this, for the plaintiff to show the insolvency of the mortgagor. See *Pouder v. Tate, supra*, where it was said: "It is claimed that as the insolvency of the mortgagor was not averred in the petition, the appointment of a receiver was unauthorized. This averment is not essential where, in the foreclosure of a mortgage, the appointment of a receiver is asked. In such case it is only required to show that the mortgaged property is not sufficient to discharge the mortgage debt. Section 1222, R. S. 1881, clause 4. This fact was plainly presented by the appellee's petition, and sufficiently sustained by affidavits filed in its support, to prevent this court from interfering with the action of the trial court in appointing a receiver."

Third and Fourth. Under the sweeping provisions of the statute authorizing the appointment in this State of a receiver in cases like this—R. S. 1881, section 1222—we think the court below possessed ample power to authorize the receiver, for the purposes stated in the order appointing him, to take possession of the mortgaged property, as well as the crops growing thereon, although in the actual possession of the appellants. The propriety of investing the court with such power was purely a question for the Legislature to determine. It is our privilege and duty merely to construe the statute as enacted.

It is insisted by the appellants that the court below erred in permitting the appellee to present the additional affidavits above referred to. We think the court properly received the affidavits of persons, explaining and correcting erroneous assertions set forth in former affidavits by them made. It was proper for the court to do so, in justice to the persons who made the affidavits, and to the appellee, who, otherwise, might

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have been prejudiced in his rights by the incorrect statements so corrected. The admission by the court of additional affidavits as to the insolvency of the appellant Philip Hursh, if material, was a matter so much "within the discretion of the trial court that the appellate courts uniformly refuse to interfere unless it clearly appears that there has been an abuse of discretion resulting in manifest injury" to the opposite party. *Goodwin v. State*, 96 Ind. 550, and the cases there cited. It is not apparent that any such abuse of discretion occurred in this case. Nor was the question as to the insolvency of Philip Hursh of any materiality, as above decided, and hence, even if error was committed by the court in the admission of the affidavits, it was a harmless one, that would not authorize us to reverse the judgment or order of the court below.

As there is no error in the record, the order of the court below ought to be affirmed.

PER CURIAM.—The order of the court below is affirmed, at the costs of the appellants.

Filed Jan. 9, 1885.

 No. 11,428.

FOSTER v. BRINGHAM ET AL.

PARTIES.—*Suit on Replevin Bond.*—*Waiver.*—Where a replevin bond is executed to a sheriff and execution plaintiff jointly, and an action thereon is subsequently brought by the execution plaintiff alone, the defect of plaintiffs will be waived by the failure of defendants to demur therefor.

EXECUTION.—*Sale of Mortgaged Chattels.*—*Possession.*—Under the statute mortgaged chattels may be levied upon and sold, subject to the mortgage, to satisfy an execution against the mortgagor. The officer is entitled to possession of such chattels, as against the mortgagee, for the purpose of making the sale.

ASSIGNMENT OF ERROR.—Assignments of error, such as "rendering judgment for the defendant on the finding," and "not rendering judgment for the plaintiff for the full value of the corn replevied," are too general to present any question; and, besides, such objections can not be made for the first time in the Supreme Court.

99	505
135	486
99	505
146	579

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REPLEVIN.—*Judgment.*—Where there is no judgment for the return of the property replevied, there can be no judgment for its value.

SUPREME COURT.—*Harmless Error.*—Where the facts are specially found by the trial court, and no objection is made to the finding, and it appears that, upon the facts so found, the judgment is clearly right, such judgment will not be reversed for intermediate errors.

From the Superior Court of Tippecanoe County.

G. J. Eacock, G. O. Behm and A. O. Behm, for appellant.
J. R. Coffroth and T. A. Stuart, for appellees.

BICKNELL, C. C.—Moore mortgaged corn to Bringham to secure the payment of \$700 and interest. The mortgage provided that the mortgagor should retain possession until default in payment, and that, if at any time before the day of payment, the mortgagee should "feel unsafe or insecure," he might take the corn and sell it to satisfy the debt. Before the day of payment, Foster issued an execution on a judgment he held against Moore, the mortgagor, and the corn, yet in Moore's possession, was taken under said execution by the sheriff.

The mortgagee brought replevin for the corn against the sheriff and Foster, and gave them an undertaking pursuant to the statute. The coroner took the corn from the sheriff and delivered it to the mortgagee, who thereupon dismissed his replevin suit. Upon that dismissal there was no judgment for a return of the corn.

Foster then brought the present action against Bringham and Murdock, the principal and surety in the undertaking in replevin.

It was held in *Walls v. Johnson*, 16 Ind. 374, where the undertaking was given to the sheriff alone, that in an action thereon the plaintiff in the execution was properly joined with the sheriff as plaintiff in the suit on the undertaking, although not named in the undertaking.

Here the undertaking was given to the plaintiff in the execution and to the sheriff jointly, and the sheriff is not made a co-plaintiff in the suit thereon. If there is any defect of

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plaintiffs, it is waived by the failure of the defendants to demur therefor. R. S. 1881, sections 339, 343.

The complaint states as a breach of the undertaking the failure to prosecute the replevin suit with effect and without delay, and it seeks to include in the damages the value of the corn. There are three conditions in the undertaking, viz.:

1. To prosecute the replevin suit with effect and without delay.
2. To return the property upon a judgment for such return.
3. To pay the amount recovered by the defendants in the replevin suit.

The complaint alleges a breach of the first only of these conditions. Mortgaged chattels may be levied upon and sold, subject to the mortgage, to satisfy an execution against the mortgagor. R. S. 1881, section 722. The officer holding such an execution is entitled to possession of the mortgaged chattels as against the mortgagee, for the purpose of making such sale. R. S. 1881, section 751; *Sparks v. Compton*, 70 Ind. 393; *Olds v. Andrews*, 66 Ind. 147.

The defendant Bringham, the principal in the undertaking, answered in two paragraphs, to wit:

1. The general denial.
2. A special defence, alleging the execution of the mortgage as aforesaid, that the mortgage debt was due and unpaid, and that the mortgaged property was never of sufficient value to pay the mortgage debt. This defence was pleaded as to all except nominal damages.

The defendant Murdock, the surety in the undertaking, answered in two paragraphs, to wit:

1. The general denial.
2. A special defence, alleging that the costs in the replevin suit were all paid by Bringham before the commencement of this suit. This defence was pleaded as to so much only of the complaint as sought to recover damages for the costs incurred in said replevin suit.

Murdock also filed a cross complaint against his codefend-

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ant Bringham, praying that his rights as surety might be protected in the judgment. A demurrer to the second paragraph of Bringham's answer was overruled. The plaintiff excepted and replied in denial of said second paragraph. There was neither demurrer nor reply to the second paragraph of Murllock's answer, and there was no answer to his cross complaint.

The court, at the request of the plaintiff, found the facts specially and stated conclusions of law thereon. The facts were found as hereinbefore stated, and the court also found that said Bringham had paid \$17.30 of the costs of his said replevin suit, and that \$3.80 of such costs remained unpaid. The court also found that the value of the corn was only \$394.06, the mortgage debt being \$700 and interest. The court stated as conclusions of law, that the undertaking was forfeited by reason of the failure of the defendant Bringham to prosecute his replevin suit with effect and without delay, and that the only damages to be recovered by the plaintiff in the present suit had accrued by reason of the failure of said Bringham to pay said sum of \$3.80, part of the costs aforesaid. The plaintiff excepted to the conclusions of law. There was a finding and judgment for the plaintiff for \$3.80, and he appealed.

There was no motion for a new trial. The record shows no objection made below to the judgment, and no motion to modify or correct it. And there is no error assigned upon the conclusions of law. The only errors assigned are:

1. Overruling the demurrer to the second paragraph of Bringham's answer.
2. Rendering judgment for the defendant on the finding.
3. Not rendering judgment for the plaintiff for the full value of the corn replevied.

The second and third specifications are too general to present any question. *McFarland v. McFarland*, 40 Ind. 458. *Whitney v. Lehmer*, 26 Ind. 503. And such objections can not be made for the first time in this court. *Kissell v. Anderson*, 73 Ind. 485; *Teal v. Spangler*, 72 Ind. 380; *Clayton v. Blough*, 93 Ind. 85.

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As to the second specification, it is unavailable, because, in fact, there was no judgment rendered for the defendant; the judgment was for the plaintiff. And the third specification can not be sustained, because there can be no judgment for the value of the property in a suit like this, where there was no judgment for a return. *Thomas v. Irwin*, 90 Ind. 557. As to the first specification of error, to wit, overruling the demurrer to the second paragraph of Bringham's answer, the judgment could not be reversed, even if that demurrer ought to have been sustained. No objection was made to the special finding of the facts. Upon those facts the judgment was clearly right, and it could not be reversed for intermediate errors. *Whitworth v. Ballard*, 56 Ind. 279; *Mitchell v. Johnson*, 60 Ind. 25; *McComas v. Haas*, 93 Ind. 276. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed Jan. 9, 1885.

No. 11,884.

MOREHOUSE ET AL. v. HEATH.

VENDOR AND VENDEE.—Deed.—Covenants.—Breach.—Practice.—Damages.—

New Trial.—In an action upon a covenant in a deed against encumbrances, no question arises as to the amount of the recovery, unless a new trial is asked either upon the ground that the damages assessed are excessive, or that there was error in the amount of the recovery.

SAME.—Encumbrances.—Payment.—Recovery.—The conveyance of land by a deed with general covenants entitles the vendee to recover such sum from the vendors as he was compelled to pay in extinguishment of such encumbrance, unless the vendee assumed the payment of such encumbrance as a part of the purchase-money.

SAME.—Mortgage.—Foreclosure.—Sale.—Title.—Where land is thus conveyed, and the same and other land are encumbered by a mortgage which is subsequently foreclosed and the title conveyed thereunder to another, the vendee in such conveyance is entitled to recover from the vendors such reasonable sum as he has been compelled to pay to extinguish such title to his land.

Morehouse et al. v. Heath.

SAME.—Instruction.—Extinguishment of Encumbrance.—An instruction to this effect is not faulty because it fails to inform the jury that if such title is not extinguished by such payment, substantial damages can not be recovered. If such fact is deemed essential and not proved, the defendant should prepare and request the proper instruction.

SAME.—Agreement.—Evidence.—Res Gestæ.—Lien.—In such case, an agreement made between the purchaser, at such foreclosure sale, and the vendee, in relation to the conveyance of such land by the former to the latter, upon payment of his proportion of the debt, is admissible in evidence as part of the transaction whereby such encumbrance was extinguished.

SAME.—Evidence of Assumption of Encumbrance.—In such case, evidence that the vendee was upon the land before its purchase, knew for what purposes it was specially adapted, and knew it was of much greater value than the contract price, is not admissible to show that he assumed as part consideration of the purchase the encumbrance in question.

SAME.—Statements.—Hearsay.—Statements made by one of the parties to a controversy, in the absence of the other, as to the terms of their contract, are mere hearsay evidence, and are not admissible as against the other party.

SAME.—Res Gestæ.—Such statements made by the defendant at the time he employed an attorney to remove the encumbrance is not a part of the *res gestæ*, and is therefore not admissible to rebut such inference as grows out of such act.

SAME.—Consideration of Conveyance.—A memorandum of the various amounts that composed the consideration of a conveyance, made by one party in the presence of the other at the time of such conveyance, is admissible in evidence for the purpose of showing what was the real consideration of such conveyance.

SAME.—Possession of Tenant.—The fact that the land at the time it was conveyed was in the possession of a tenant, and such fact was not mentioned in the deed, was not admissible in evidence for the purpose of showing that the vendee probably took the land subject to the encumbrance.

PRACTICE.—Recalling Witness.—No error is committed in refusing to allow a party to recall a witness to testify to a matter to which he has already testified.

SAME.—Argument of Counsel.—Witness.—Evidence.—The statement of the counsel in the closing argument, that a witness was not disinterested, is not beyond the scope of a legitimate discussion, and where a paper, the contents of which were not read, was admitted to have been delivered to the plaintiff as containing a statement of the amount of taxes due upon the land, a statement in the closing argument that such paper had been delivered was not improper.

From the Tippecanoc Circuit Court.

Morehouse *et al.* v. Heath.

B. W. Langdon and *T. F. Gaylord*, for appellants.

S. P. Baird and *W. D. Wallace*, for appellee.

BEST, C.—The appellee brought this action against the appellants for breach of a covenant against encumbrances.

The complaint avers, in substance, that in consideration of \$9,300 the appellants, on the 21st day of September, 1880, conveyed by warranty deed to the appellee the land in the complaint described; that at the time of such conveyance the land was encumbered by a judgment in favor of the estate of John Purdue, deceased, and that on the 2d day of September, 1882, said land, with seventy acres of other land, a part of which was owned by one William C. Wormley, was sold by the sheriff of said county to William C. Wilson and Jay H. Adams for \$2,315.91, the amount of principal, interest and costs due upon said judgment; that on the 1st day of September, 1883, said Wilson and Adams, in consideration of \$2,586.42, paid them by said Wormley, assigned said certificate of purchase to one R. S. McMillen, as trustee; that on the 6th day of September thereafter, said McMillen received from the sheriff of said county a conveyance of all of said land in pursuance of said sale, and the appellee, on said day, was compelled to, and did, pay said Wormley, in order to release his land from said conveyance, \$2,200. Wherefore, etc.

The appellants each filed an answer of two paragraphs. The first paragraph of each answer was a general denial, and the second averred, in substance, that in part consideration of said conveyance the appellee agreed to purchase said land, subject to the Purdue judgment. A demurrer was overruled to the second paragraph of each answer, and a reply in denial was filed. The issues were tried by a jury, and a verdict was returned for the appellee, assessing his damages at \$2,245.10. Separate motions for a new trial by each appellant were overruled, and these rulings are assigned as error.

The first point made by the appellants is, that the evidence fails to show that the title acquired by McMillen was ex-

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tinguished by the payment made by the appellee, and that in the absence of such showing the appellee was not entitled to recover anything more than nominal damages. We think the evidence justified the jury in finding that the title acquired by McMillen to the appellee's land was conveyed by the former to the latter at the time the payment was made to Wormley, as alleged; but, however this may be, the record presents no question concerning the amount of the recovery. The appellants did not ask a new trial either on the ground that the damages assessed were excessive, or that there was error in the assessment of the amount of recovery, and in the absence of such motion the record presents no such question. *Rout v. Meniffee*, 59 Ind. 525; *Smith v. Smith*, 77 Ind. 80; *Millikan v. Patterson*, 91 Ind. 515.

The appellants also insist that the court erred in charging the jury that "the deed of conveyance introduced in evidence is a warranty deed, and covenants on its face that the property is free from encumbrances, except the encumbrances therein named, and if the plaintiff has been compelled to and has paid any sum not exceeding the amount of the encumbrance, interest and costs, to clear off an encumbrance not named in the deed, as charged in the complaint, he has the right to recover such sum in this action, with interest from the time of payment at the rate of six per cent. per annum, unless as part of the consideration of said deed the plaintiff agreed to take said deed subject to such encumbrance."

The principal objection urged to this instruction is, that it fails to inform the jury that before substantial damages can be recovered the outstanding title of McMillen must have been extinguished. Without conceding that the recovery of such damages was dependent upon such fact, it is enough to say that the undisputed evidence in this case upon such question justified the jury in finding that such title was conveyed to the appellee at the time such payment was made, and, therefore, the instruction, as applicable to the evidence, was not erroneous. Besides, if the appellants really believed there

was any question upon the evidence as to the extinguishment of such title, and deemed proof of such fact essential to the recovery of substantial damages, they should have prepared and requested the proper instruction. *Reissner v. Oxley*, 80 Ind. 580; *Dyer v. Dyer*, 87 Ind. 13.

It is also said that the instruction withdraws from the jury the question whether or not the amount paid was fairly and reasonably necessary to remove the encumbrance. We think otherwise. It informs the jury that the appellee is entitled to recover any sum he was compelled to and did pay, not exceeding the amount of the encumbrance. A payment he was compelled to make would seem to be necessary in order to remove the encumbrance.

It is next insisted that the court erred in permitting the appellee to read in evidence a written agreement made by him, Wormley and McMillen, in relation to the redemption of said land from the sale upon the Purdue judgment. During the year of redemption, Wormley purchased the certificate of sale and then assigned it to McMillen under an agreement that if the land should not be redeemed, he should take a sheriff's deed, and upon the payment of \$2,194.66 by the appellee to Wormley, that McMillen should convey by quitclaim deed the appellee's land to him, and quitclaim the residue to Wormley. The land was not redeemed, but was conveyed to McMillen, and thereafter the appellee paid to Wormley the amount of money mentioned in said agreement. The evidence also tended to show, as we have before remarked, that McMillen then conveyed the appellee's land to him, and this agreement was admissible in evidence for the purpose of showing that the money paid to Wormley was paid to remove such encumbrance from the appellee's land. It constituted a part of the transaction whereby such encumbrance was extinguished, and was, therefore, admissible to establish such fact.

The appellants, in support of their affirmative defence, called

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witnesses, and sought to prove by them, that the appellee had been over the farm before he purchased it, what he said about it being a stock farm, what kind of farm it was; that the appellee knew it was worth \$8,000 more than he agreed to pay and the Purdue judgment; that he knew Levi Morehouse was not able to pay the Purdue judgment, and that the land was fairly worth \$50 per acre. These offers were made while the witnesses were being examined in chief, and after some of them had testified that the appellee had agreed to take the land subject to the Purdue judgment. This proffered testimony was excluded, and the appellants insist that such ruling was erroneous.

This testimony had no tendency, as it seems to us, to prove that the appellee agreed to take the farm subject to the Purdue judgment, and was, therefore, inadmissible for such purpose. It is not insisted that it could of itself subserve any such purpose, but it is contended that it was admissible to lend probability to the testimony of the appellants' witnesses. We think otherwise. The most of it was clearly inadmissible for any such purpose. The appellee's acquaintance with the farm, its adaptation to stock raising, and his familiarity with Levi Morehouse's financial condition, were circumstances entirely too remote to subserve any purpose as original evidence. The value of the land was a more significant fact, but this, at most, was a mere equivocal one. If the land—392 acres—was worth the price claimed, this fact showed that the appellants were selling it for about one-half of its value, whether it was sold for the price named in the deed, or for such price subject to the Purdue judgment. In either event the value of the land largely exceeded the contract price, and, therefore, its value was, at most, a very equivocal circumstance, one that could not, as it seems to us, aid the jury in determining whether or not the land was purchased subject to the Purdue judgment. At least we can not say that the appellants were injured by the exclusion of such testimony,

and, therefore, conclude that no error was committed by the ruling.

The appellants also complain because the court refused to allow them to prove that the appellee was upon the farm in 1878 for the purpose of buying it. The appellee afterwards testified that he was then upon the farm for such purpose, and if there was any error in the court's ruling, this testimony rendered it harmless.

The Purdue judgment was rendered against Benjamin Morehouse while he owned the land, and in 1882 the appellee inquired of him what he and Levi intended to do about it, and said that Levi should pay it, and that he would loan him the money for such purpose. This conversation was reported by Benjamin to Levi, and the appellants offered to prove that Levi, in response, said to Benjamin that the appellee had taken the land subject to the judgment, and is bound to pay it himself. This was mere hearsay, and was incompetent. The statement was not made to the appellee, nor was he bound by it. The ruling was right.

After the purchase of the farm by the appellee, the appellant Levi brought an action in the appellee's name to set aside the sale of his land upon the Purdue judgment, and the appellee offered such record in evidence, as well as some admissions made by said Levi as to the employment of an attorney to prosecute such action, to show that he regarded himself bound by his covenant to remove such encumbrance. This evidence was admissible.

E. A. Greenlee, Esq., was employed by Levi Morehouse to bring such action, and the appellants called him and offered to prove by him that when he was employed said Levi said to him that he was informed that he had said the sale was void, and that he would get it set aside for \$50, or charge nothing, to which the witness assented, and thereupon Levi said to him "that it was the agreement of John H. Heath to take said land subject to said judgment, but rather than have

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trouble with Heath he would employ witness on such terms." This testimony was excluded, and, we think, properly. The appellee was not bound by the statement of Levi that he had agreed to take the land subject to the Purdue judgment, and it was not admissible as a part of the *res gestæ*. A party's statement as to his purpose in doing an act, made at the time, is generally admissible as a part of the *res gestæ*, but a party can not narrate a past occurrence and thus render his statement of such fact admissible against the opposite party. Though made at the time of doing an act, it is no part of the act, and, therefore, is not admissible upon such ground. 1 Whart. Ev., section 261. The offer of appellants embraced such statement, and was, therefore, properly excluded.

At the date of the deed the parties met to consummate the contract, but owing to some disagreement the purchase was then broken off, the appellee claims, because he then discovered that the "Grave heirs" owned a small interest in the land, and the appellants because they wanted the appellee to take the land subject to the Purdue judgment. The appellee, in rebuttal, called A. H. Yount, Esq., in whose office the interview occurred, and he testified that nothing was said about the Purdue judgment.* The appellants then called Levi Morehouse, and offered to prove by him that the parties did not break up the trade on account of any interest or title of the Grave heirs. This was properly excluded, because the witness was allowed to testify that nothing was said in that interview about the Grave heirs.

The appellee was permitted to read in evidence a memorandum of the amount of cash paid, and the various sums assumed in the purchase of the land. This memorandum, he testified, "I made * * * with Levi sitting at my table." This was sufficient to render it admissible.

The appellants also offered to prove that the land, at the time of the sale, was held by one Cooper under an unexpired lease, and that they informed the appellee of such fact. The

ground upon which it is insisted that this testimony was relevant is, that as this lease constituted an encumbrance subject to which the land was purchased, and as this encumbrance was not mentioned in the deed, this fact lends probability to the claim of appellants that the appellee also took the land subject to the Purdue judgment. This, by no means, follows. Besides, the proposition involves the assumption that the lease was not itself embraced within the covenant.

Finally it is insisted that the course pursued by one of the appellee's counsel, in the closing argument to the jury, is such misconduct as to warrant the reversal of the judgment.

During the trial the appellant Levi J. Morehouse testified that a portion of the land had been sold for taxes, and that he procured from the treasurer of the county a statement of the amount that would be required to redeem it. A paper was then handed him and he was asked by the appellee if that was not the statement, and if he did not deliver it to the appellee. He said that such paper was the statement, but could not remember whether he had delivered it to the appellee; thought he had, but afterwards said that he had not. The paper was not read in evidence. In closing the argument one of the appellee's counsel held a paper toward the jury and said: "He wanted them to observe the paper; that it was the paper delivered by Mr. Levi J. Morehouse to John W. Heath." To this statement the appellants objected and excepted.

The counsel then said "that the jury would remember that in the testimony of Levi J. Morehouse a certain paper representing certain items of tax was handed to said Levi, and he was asked if he didn't give that to John W. Heath, and he couldn't remember, but thought he did;" that said counsel then said that all he wanted was to discuss the evidence that was in, and "this was the paper shown Levi J. Morehouse, which he said he couldn't remember whether he handed it to Heath or not." To these remarks the appellants ob-

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jected and excepted, and the court said it was not proper to comment on anything not in the evidence.

The counsel then said to the jury that this paper related to the case, and called their attention to the fact that it had been excluded, to which appellants also objected and excepted. .

The counsel also said to the jury: "That Levi J. Morehouse was not the indifferent party in the negotiations for the sale of this land, but was anxious for the sale," to which the appellants also objected and excepted.

The last statement of the counsel does not appear to us to be an improper comment upon the attitude of one of the parties to the transaction in controversy. It appears rather to be fairly within the range and scope of a legitimate discussion of the questions in dispute.

The exhibition of the paper, and the statements of counsel concerning it, are subject to some criticism, but we can not see how these things could possibly affect the appellants injuriously. The mere exhibition of the paper could not thus affect them, and there was no attempt either to comment upon its delivery or upon its contents in connection with any disputed fact in the case. Its contents were not before the jury, and, of course, could not legitimately be commented upon; but we can not say that the evidence before the jury did not authorize the counsel to insist that such statement had been delivered; if so, the mere statement that the paper exhibited was such statement in no manner affected the appellants injuriously.

This disposes of all the questions discussed by the appellants in their brief, and as we are of opinion that no error was committed against them, the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby affirmed, at the appellants' costs.

Filed Jan. 23, 1885.

Evansville and Terre Haute Railway Company v. McKee.

No. 11,371.

EVANSVILLE AND TERRE HAUTE RAILROAD COMPANY
v. MCKEE.

RAILROADS.—*Principal and Agent.—Liability for Acts of Agent.—Torts.—*

Where a railroad company employs an agent to detect, arrest and prosecute persons who unlawfully obstruct its track, and the agent, acting in the scope of his employment, arrests an innocent person, the railroad company is liable therefor.

From the Knox Circuit Court.

A. Iglehart, J. E. Iglehart and E. Taylor, for appellant.

G. G. Reily, W. C. Niblack, W. R. Gardiner and S. H. Taylor, for appellee.

ELLIOTT, J.—The complaint of the appellee contains, among others, the following allegations:

"Plaintiff further says that the defendant Dwyer was at the day aforesaid, and for more than a year prior thereto had been, the agent and employee of said railroad company for the purpose of detecting, arresting and prosecuting all persons who should, in any way, unlawfully obstruct the railroad aforesaid in said county. That on the — day of November, 1882, the railroad track aforesaid was obstructed by some person or persons unknown to this plaintiff, and without his knowledge, direction or consent, and thereupon said railroad company directed the defendant Dwyer to arrest the persons who had so obstructed said road and cause them to be criminally prosecuted for such obstructions in the courts of said county; that pursuant to said direction so received from said company, and in the discharge of his authority as the agent and employee of said railroad company as aforesaid, the defendant Dwyer thereupon proceeded to detect and arrest and prosecute criminally in the courts of said county the person or persons who had so obstructed the railroad aforesaid, and in so doing said Dwyer assaulted, arrested and falsely imprisoned plaintiff at said county on the — day of December,

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124	400
99	519
135	520
99	519
138	180

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1882, without any legal authority so to do, upon the charge made by said Dwyer against him, said plaintiff, of unlawfully obstructing said railroad in said county at the day the same was obstructed, as aforesaid, to wit, on the — day of November, 1882; that thereupon said Dwyer placed handcuffs upon his wrists, and in company with others, in said Dwyer's employ, by threats of personal violence to him, said plaintiff, and by catching hold of the plaintiff's person, compelled the plaintiff to go with him, said Dwyer, from his home in Knox county, Indiana, distant from Emison's Station about three miles, to said station, in the night over a dark road, in the woods where it was cold and disagreeable, at which station said Dwyer compelled said plaintiff to get into a car on said railroad provided by said railroad company for that purpose, and said Dwyer thereupon, by means of said car, carried said plaintiff upon said railroad a distance of ten miles, at which point said Dwyer put said plaintiff off of said car in the woods, in the middle of the night, and in the darkest kind of a night, from which point said plaintiff was compelled to and did wander home, a distance of twelve miles, on foot as best he could."

The appellant, in support of its assault upon the complaint, invokes the general rule, that a principal is not responsible for the torts of an agent unless committed while engaged in the performance of duties within the scope of his agency. This general rule is too well settled and too firmly grounded in principle to be the subject of debate, and if this case is within it there is no necessity for discussion. But whether the case is within the rule is the question, and not whether there is such a rule as that asserted.

The liability of the principal is not affected by the fact that the tort was wilfully committed, for it is now firmly settled that whether the wrong results from negligence or is the product of wilfulness, the principal is responsible if it was committed within the line of the agent's duty. *Indiana, etc., R. W. Co. v. Burdge*, 94 Ind. 46; *Louisville, etc., R. R. Co. v.*

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Kelly, 92 Ind. 371; S. C., 47 Am. R. 149; *Terre Haute, etc., R. R. Co. v. Jackson*, 81 Ind. 19; *Am. Ex. Co. v. Patterson*, 73 Ind. 430; *Pittsburgh, etc., R. R. Co. v. Theobald*, 51 Ind. 246; *Indianapolis, etc., R. W. Co. v. Anthony*, 43 Ind. 183; *Jeffersonville R. R. Co. v. Rogers*, 38 Ind. 116; S. C., 10 Am. R. 103; *Stewart v. Brooklyn, etc., R. R. Co.*, 90 N. Y. 588; S. C., 43 Am. R. 185; *Hoffman v. New York Cent., etc., R. R. Co.*, 87 N. Y. 25; S. C., 41 Am. R. 337; *Quigley v. Central Pacific R. R. Co.*, 11 Nev. 350, *vide p.* 364; *Chicago, etc., R. R. Co. v. Flexman*, 103 Ill. 546; S. C., 42 Am. R. 33.

A principal is responsible for the acts of the agent performed within the line of his duty, whether the particular act was or was not directly authorized. *Louisville, etc., R. R. Co. v. Kelly, supra*; *Terre Haute, etc., R. R. Co. v. Jackson, supra*; *Am. Ex. Co. v. Patterson, supra*; *Noblesville, etc., G. R. Co. v. Gause*, 76 Ind. 142; S. C., 40 Am. R. 224. In speaking of a question like the one before us, the Court of Appeals of New York said: "It matters not that he" (the agent) "exceeded the powers conferred upon him by his principal, and that he did an act which the principal was not authorized to do, so long as he acted in the line of his duty, or being engaged in the service of the defendant, attempted to perform a duty pertaining, or which he believed to pertain to that service." *Lynch v. Metropolitan, etc., R. W. Co.*, 90 N. Y. 77 (43 Am. R. 141). It may be that the statement we have quoted needs some qualification, for we suppose that the belief of the agent would not make the principal responsible if it was in fact not well founded, but in the main the statement correctly states the law.

The rules we have stated lead to the conclusion that the principal is liable for the tort of the agent, where the particular act, although wilful and not directly authorized, was within the line of the agent's duty; but if the act was an independent one, and not within the scope of the agency, the person injured can not compel the principal to respond in damages. It results from these fundamental doctrines, that where

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the principal confers a general authority upon the agent to make arrests for injuries to property, and the agent, in exercising that general authority, forcibly and wrongfully arrests an innocent person, the principal who conferred the general authority is liable for the injury consequent upon the wrongful act. There are cases fully recognizing the principle upon which this conclusion is founded. The English statute authorizes the servants of railway companies to make arrests in certain cases, and it was held, in *Goff v. Great Northern R. W. Co.*, 30 L. J. C. L. 148, that a railway corporation was responsible for the tort of its servants in arresting and imprisoning an innocent man. Addison, in commenting upon the general doctrine, says: "In the ordinary course of affairs, the company must determine whether they will submit to what they believe to be an imposition, or use this summary power for their protection; and as the decision whether a particular passenger shall be arrested or not must be made without delay, it must be presumed that the officers of the company charged with the management of traffic have authority to determine whether passengers are to be taken into custody for this offence; and if by mistake an innocent person is apprehended by order of the superintendent, the company will be answerable for the wrong done." 2 Addison Torts, section 817.

This principle applies here, for the question is not as to the name or station of the agent, but whether the particular act was within the line of his agency. Where the particular act is within the scope of the agency, then it is, in legal contemplation, the act of the principal, no matter by what name the agent is designated. The material element is the authority of the agent, and not his mere name or position. *Terre Haute, etc., R. R. Co. v. McMurray*, 98 Ind. 358; *Chicago, etc., R. W. Co. v. Ross*, 31 Alb. L. J. 8. In *Chicago City R. W. Co. v. McMahon*, 103 Ill. 485, S. C., 42 Am. R. 29, a man was employed to gather up evidence for the company in a pending action, and while engaged in that ser-

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vice offered a bribe to a witness, and it was held that his act was that of his employer. In the course of the opinion it was said: "He was empowered generally to perform that duty, without special directions. That part of the business of the company was placed in his charge, with the general authority to use his judgment in its performance. His acts, therefore, were the acts of the company within the scope of his employment. His legal authority, of course, but extended to lawful acts. So it is true of all agencies, as they are not appointed for the purpose of committing wrongs, or the performance of illegal acts, except in rare cases. Few actions would be maintainable if a recovery could be had only in cases where express authority is given, or the agent required, to commit the wrong." The case of *Galveston, etc., R. W. Co. v. Donahoe*, 56 Texas, 162, asserts the same general doctrine in a very emphatic way. There the conductor caused the arrest of a passenger who had offered in payment of his fare what the conductor supposed to be a counterfeit bank note, and it was held that the company was liable. The case of *Lynch v. Metropolitan, etc., R. W. Co., supra*, holds that a railway company is liable to an action for false imprisonment, where its servants wrongfully caused the arrest and imprisonment of a person who was endeavoring to enter one of the stations of the company in violation of its rules. The decision in *Am. Ex. Co. v. Patterson, supra*, is fully in point here, and really rules the case. It was there said in speaking of the authority of the corporation to employ agents to make arrests, and of the liability of the corporation for the torts of the person so employed, that "Such companies must be deemed to be empowered to employ agents to do such work, as much as to accomplish its ordinary purposes and business. It sufficiently appears that the defendant corporation did employ, instigate and procure the action of Hazen, as set forth. From this it necessarily follows that the company must be held liable for any trespass committed by her said agent in the prosecution of that employment." A corporation, which selects an agent and

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gives him charge of a special department of its affairs, is responsible for the acts of the agent performed while engaged in the line of his duties, although the particular act may not have been authorized. This responsibility is not confined to acts rightfully performed, but extends to such as are wrongfully done. The test of responsibility is not whether the particular act was rightfully done and specifically authorized, but whether it was within the scope of the agent's authority. Where, as here, the corporation employs an agent for the purpose of arresting persons who do injury to its property, it is answerable for the tort of the agent who wrongfully arrests one who has committed no offence. 22 Albany L. J. 484.

The case of *Helfrich v. Williams*, 84 Ind. 553, so much relied on by the appellant, does not antagonize our conclusion. In that case the point decided was that a complaint against the principal was not good unless it alleged that the negligent act was committed by the agent within the line of his duty. So we hold here. We do not hold the appellant responsible for the tort of Dwyer, simply because he was its agent, but we hold it liable for the reason that he committed the tort while engaged in his principal's service, and within the line of his duty.

Dwyer testified, among other things, that "Mr. Hepburn, superintendent of defendant, directed me to go and hunt up any person I found guilty;" and there was other evidence tending to show the employment. The fact that the agent arrested a person not guilty does not relieve the principal from liability, for the delegation of authority to arrest persons deemed guilty by the agent committed to him a broad general power, and, if the agent, in attempting to exercise that power, did another injury, the principal must answer in damages. It was not necessary for the appellee to prove that the injury resulted from a rightful attempt to exercise the authority conferred, for whether the attempt was rightful or wrongful the injured person may compel the principal to respond in damages for an illegal injury inflicted in the exer-

The Bass Foundry and Machine Works v. Gallentine *et al.*

cise of the general authority. The question is not whether the act of the agent was a rightful exercise of the duty he owed his principal, but whether it was within the general line of his employment.

The evidence very satisfactorily shows that the arrest of the appellee was made while Dwyer was engaged in the general line of his duty, for it shows that he was at the time searching for persons who had illegally obstructed the appellant's track. There are facts from which it may well be inferred that the arrest of McKee was not for an independent crime, but for an offence against the corporation. It is sufficient, if the facts proved supply reasonable grounds for the necessary inferences, and here the evidence does supply such grounds. It is not necessary to make out a case by positive evidence. *Indianapolis, etc., R. R. Co. v. Collingwood*, 71 Ind. 476; *Indianapolis, etc., R. W. Co. v. Thomas*, 84 Ind. 194; *Hedrick v. D. M. Osborne & Co., ante*, p. 143.

Judgment affirmed.

Filed Jan. 21, 1885.

No. 11,657.

THE BASS FOUNDRY AND MACHINE WORKS v. GALLENTINE ET AL.

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FIXTURES.—Mortgage.—Foreclosure.—Purchaser.—Agreement.—The owner of real estate with a flouring mill thereon, which was subject to a mortgage duly recorded, procured new machinery therefor on credit, upon agreement that title to the machinery should not pass until it was paid for. The machinery was attached to the realty as was intended.

Held, that a purchaser upon foreclosure took title to the machinery as against the vendor of it, notwithstanding the contract and a failure to pay for it.

From the Marshall Circuit Court.

M. A. O. Packard, O. M. Packard, W. H. Coombs, R. C. Bell and S. Morris, for appellant.

A. C. Capron, J. W. Parks and S. D. Parks, for appellees.

The Bass Foundry and Machine Works v. Gallentine *et al.*

BICKNELL, C. C.—The firm of Gallentine Brothers owned real estate in Marshall county, known as the Sharley flouring-mill, subject to a mortgage made by them in 1879 to secure a part of the purchase-money.

In May, 1881, they wrote to the Bass Foundry and Machine Works, of Fort Wayne, Indiana, as follows:

“Please ship to the undersigned, at Bourbon, Indiana, one middlings mill complete, one Wolf & Hamaker purifier No. 3, also one single reel bolting chest, cloth, complete, with double conveyors, also two new bolting cloths to cloth two reels now in our mill with two stands of elevators, with buckets and belts for the same, also all leather belting necessary to make the change complete; shaftings and pulleys. The above described property, with labor of millwright to complete job, is supposed to amount to about one thousand dollars. It is hereby understood and agreed that the title of the above described property shall remain in the Bass Foundry and Machine Works until the above amount is paid in full, and if notes are given, until the full amount of said notes and interest thereon has been paid, said notes being received not in payment, but only as evidence of indebtedness. It is further agreed by the parties, that, if not paid, the said Bass F. & M. Works are to have peaceable possession without litigation.

(Signed) “GALLENTINE BROS.”

This proposition was accepted, and in pursuance thereof said property was delivered and was put up and fastened to the mill, and was used as a part thereof.

Afterwards, in 1882, the aforesaid mortgage was foreclosed, and at the foreclosure sale, in July, 1882, the land and mill were bought by the mortgagee, who received the sheriff's certificate of sale and assigned it to Clara V. Gallentine, to whom the sheriff made a deed on the 19th of July, 1883. Clara V. Gallentine was the wife of one of the mortgagors.

On the 9th of August, 1883, the said Bass Foundry and Machine Works commenced this action of replevin against

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said Clara V. Gallentine and one Noggle, to recover the possession of the machinery sold as aforesaid.

The complaint was in two paragraphs. The first was in the statutory form; the second was special, stating the sale and delivery as aforesaid; that the machinery was never paid for, and remained the property of the plaintiff; that the defendants had possession of it, and on demand had refused to deliver it to the plaintiff, and were unlawfully detaining it, etc. The defendant Noggles filed a disclaimer.

The defendant Clara Gallentine answered in three paragraphs, to wit:

1. The general denial.

2. Alleging the mortgage, foreclosure and sale as aforesaid, and that she purchased the certificate of sale and took the sheriff's deed for the mortgaged property, for a valuable consideration, and without notice of said contract of sale, and that said machinery had been attached and fastened to the mill, and made part thereof, so that it could not be removed without rendering the mill wholly useless.

3. Payment of the plaintiff's claim before suit brought.

The record shows no reply to the special defences, but the cause having been submitted to the court for trial, these defences are regarded as denied. The court found for the defendant; the plaintiff's motion for a new trial was overruled, and judgment was rendered on the finding. The plaintiff appealed. The only error assigned is, overruling the motion for a new trial.

The reasons for a new trial are that the finding is not sustained by sufficient evidence, and is contrary to the evidence and contrary to law.

The only question is, did the machinery become part of the realty, so that the defendant became its owner under the sheriff's deed?

Ordinarily, personal property, which is made a fixture, becomes a part of the real estate to which it is affixed, even although the annexation be made by mistake, or by wrongful

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act. *Seymour v. Watson*, 5 Blackf. 555; *Ricketts v. Dorrel*, 55 Ind. 470.

Machinery put into a mill without any special contract on the part of the owner of the freehold, and fastened thereto and used therewith, becomes a part of the freehold. *Millikin v. Armstrong*, 17 Ind. 456; *Bowen v. Wood*, 35 Ind. 268; *Pea v. Pea*, 35 Ind. 387; *Kennard v. Brough*, 64 Ind. 23; *Hamilton v. Huntley*, 78 Ind. 521 (41 Am. R. 593); *Sparks v. State Bank*, 7 Blackf. 469.

But, as between vendor and vendee, where no rights of third persons intervene, personal property, under such an agreement as is stated in the complaint, although annexed to the freehold, so that it would otherwise be a part thereof, remains the property of the vendor until paid for. *Frederick v. Devol*, 15 Ind. 357; *Yater v. Mullen*, 24 Ind. 277; *Pea v. Pea*, *supra*; *Taylor v. Watkins*, 62 Ind. 511; *Griffin v. Ransdell*, 71 Ind. 440.

If, however, the vendee is not the owner of the realty, but is a mere lessee, such a contract will not bind the owner of the realty, who did not consent to it, and has not waived his rights. This was decided in the case of *Hamilton v. Huntley*, *supra*. That was an action to foreclose two mortgages on land including a mill and its appurtenances. Huntley and others were made defendants, and they filed a cross complaint, alleging that they had furnished machinery to Peyton Johnson after the execution of the mortgages and before suit brought thereon, upon an agreement that the property was not to be his until the performance of certain conditions; that these conditions were not complied with; that the property, although attached to and used in the mill, still belonged to them, and they prayed that the same be excepted from the decree of foreclosure and declared their property.

The mortgagees answered, alleging that the mill belonged to Minerva Johnson, and that Peyton was only a tenant, and that during the tenancy, without the knowledge or consent of the respondents, he had procured the machinery and fast-

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ened it to the mill building, so that the mill could not be used without it, and that the respondents had no notice of the claim of the cross complainants. This was held to be a good answer, and it was held that such a contract between the cross complainants and Peyton Johnson did not bind the mortgagees.

The difference between the case just cited and the present case is that the Gallentines, who made the contract with the appellant, were, at the date of the contract, the owners of the land and mill.

Undoubtedly, as between them and the appellant, the title to the machinery remained in the appellant, and if no superior rights of third persons had intervened, the machinery might have been sold on execution as the property of the appellant. *State, ex rel., v. Bonham*, 18 Ind. 231. But where such machinery has been made a fixture in a mill, the rights of a mortgagee, purchasing at a foreclosure sale under a prior mortgage of the mill, can not be impaired by a contract made during the existence of the mortgage, to which he was not a party, and of which he had no notice.

The situation of such a purchaser is the same as if no such contract existed; he has the same right to treat such machinery as part of the realty that he would have had in the absence of such a contract. The old machinery was subject to the mortgage; the mortgagor could not substitute new for old, and compel the mortgagee purchasing at the foreclosure sale to take the mill in a dismantled condition, because of a contract made by the mortgagor with some third person, to which the mortgagee was not a party, to which he never consented, and of which he had no notice.

In this case the mortgagee was the purchaser at the mortgage sale; he assigned the certificate of sale to Clara V. Gallentine, who took it and the sheriff's deed without any notice of the appellant's claim, and was a *bona fide* purchaser for value.

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It will be observed, also, that in this case the appellant sold the machinery knowing it was to be made a fixture in the mill—the contract shows it was sold for that very purpose.

The finding was sustained by the evidence, and was not contrary to law. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed Dec. 17, 1884.

ON PETITION FOR A REHEARING.

BICKNELL, C. C.—In this case the owner of personal property permitted it to be made a fixture upon real estate which was already covered by a mortgage. The property was machinery for a flouring-mill. The old machinery was torn away and the new machinery, substituted therefor, was permanently affixed to the freehold, without the knowledge or consent of the mortgagee. The mortgagee foreclosed his mortgage, bought in the property at the foreclosure sale, and sold it to the appellee, who was a purchaser for a valuable consideration without notice.

No agreement made by the mortgagor could bind the mortgagee; it would be inequitable to compel the mortgagee to take the mill in a dismantled condition; personal property, thus voluntarily affixed to mortgaged real estate, necessarily becomes subject to the mortgage; there is no semblance of equity against the mortgagee in favor of the party who thus permits his personalty to become real estate, having notice of the mortgage by the record. Property, which has thus become real estate, can not be changed again so as to become personalty without the consent of the mortgagee.

Upon the foreclosure of such a mortgage, and the purchase by the mortgagee at the foreclosure sale, he buys the property as it stands, and not a dismantled mill, with its machinery and furniture gone; his subsequent sale of the mill to a

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bona fide purchaser for value, without notice, will transfer the property as it stands. The former owner of such machinery is in no better condition than any other person who voluntarily annexes a fixture to real estate without consent of the party in interest, having notice of the interest. The cases cited in the principal opinion are decisive.

The petition ought to be overruled.

PER CURIAM.—The petition for a rehearing is overruled.

Filed April 2, 1885.

No. 11,989.

CITY OF LOGANSPORT v. UHL ET AL.

WATERCOURSE.—Injunction.—Mills.—Estoppel.—Where the owner of a water power stands by, and, not objecting, permits a city, without first assessing and paying his damages, to erect works for a water supply by drawing water from the stream and thus diminishing his power, he creates an equitable estoppel, so that he will not be protected by injunction, but will be left to assert his rights at law.

SAME.—Pleading.—Where, in such case, the general scope and prayer of the complaint shows that it was intended to obtain relief chiefly by injunction, it will, if not sufficient for that purpose, be held bad on demurrer, without considering whether it might be sufficient to warrant other relief.

From the Cass Circuit Court.

D. P. Baldwin, D. D. Dykeman, W. T. Wilson, G. C. Taber, J. C. Nelson and Q. A. Myers, for appellant.

D. B. McConnell, R. Magee, S. T. McConnell, D. C. Justice and C. E. Taber, for appellees.

NIBLACK, J.—This was a suit for an injunction. The complaint was filed on the 5th day of February, 1883, and, by amendment, became a complaint in two paragraphs:

The first paragraph was as follows:

“Dennis Uhl and Charles H. Uhl, plaintiffs, complain of the city of Logansport, and the trustees of the water-works of the city of Logansport, to wit: William H. Johnson,

99	531
194	533

99	531
131	424

99	531
134	557
135	558

99	531
140	622
142	349

99	531
149	120
149	121

99	531
154	338
156	339

99	531
166	84
166	85

99	531
169	146

99	531
171	206

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Thomas Austin and Alfred U. McAllister, and respectfully show to the court that the plaintiffs are partners, doing business under the firm name and style of D. & C. H. Uhl; that they are now, and have been for many years, engaged in the business of manufacturing flour upon the banks of the Eel river, in the city of Logansport, in said county; that as such partners, and as a part of their partnership assets, the plaintiffs are the owners of the following described water-powers, water-rights, mill-races, mill-dams, and real estate on Eel river in the said county of Cass, and State of Indiana, to wit: The present and existing dam across Eel river, opposite Elm street, and below the covered wooden bridge at the end of Bridge street, in the city, which flows the water of said river back to the foot of what was formerly Hamilton & Taber's mill-race, and now owned by the defendant, the city of Logansport, and all the water-power, and water-rights from the said Hamilton & Taber mill-race to the mouth of Eel river, together with a mill-race and all the real estate between Eel river and the south side of Front street in said city, from the said dam to the mouth of Eel river, together with all the privileges and appurtenances thereto belonging. Also a three-acre tract of land at the foot of their said mill-race, bounded and described as follows: Beginning at a stake at the mouth of Eel river, the original corner of three sections of land granted to Joseph Barron, Sr., in Cass county; thence north along the east line of the said grant or reservation, five (5) chains and forty (40) links, to a stone on the said line; thence south forty-six (46) degrees west five (5) chains and thirty-eight (38) links to a stone; thence five (5) chains and fifty (50) links to the Wabash river; thence up the said river, with the meanders thereof, to the place of beginning, the said lands being a part of the water-power on said Eel river; that the plaintiffs are the owners in fee of all the water-power, water-privileges, and water-rights on Eel river from the mouth of the said Hamilton & Taber mill-race to the mouth of said Eel river; that

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they have been the owners thereof for more than twenty years immediately past, and have been in the peaceable enjoyment of the same, they and their grantors, for more than fifty years; that they are the owners, except as hereinafter stated, of a valuable dam on the said stream of water, upon which they have expended ten thousand dollars; that they and their grantors have constructed a mill-race from the said dam, down and along the said Eel river, upon their aforesaid lands, with head-gates, at a cost of the full sum of ten thousand dollars; that at the mouth of the said race, upon their said real estate, the plaintiffs have constructed large flouring mills, and supplied them with valuable machinery; that they have erected suitable and valuable houses for storing grain, as also other necessary and suitable buildings to be used by them in their said business; that the said buildings cost the plaintiffs, and are of the value of, thirty thousand dollars; that for the past twenty-five years the plaintiffs have used, operated and enjoyed the same in the manufacture of flour, feed, and in storing grain and other property; that the said water-power, improved as aforesaid, together with the mills, machinery and buildings thereto attached, are of the value of one hundred thousand dollars; that the defendant, the city of Logansport, is a growing manufacturing city, and the plaintiffs' said water-power, water-rights, and property aforesaid, are within the corporate limits of the said defendant; the said city is also a great railroad center, within whose corporate limits are extensive railroad offices and shops, in the operation of which great quantities of water are used by the several railroad companies operating the same, all of which water is furnished and sold by the said city, defendant, to the said companies, through her water-works to be hereinafter mentioned, and for these reasons, the said water is rapidly increasing in value, and plaintiffs aver that they have never at any time relinquished any of their rights to nor interests in the said water, water-powers, water-rights and water-privileges to any person or corporation.

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"Plaintiffs further aver and charge that since the making of the aforesaid improvements, to wit: In the year 1876 the defendant, the city of Logansport, purchased from Messrs. Cecil & Wilson the upper contiguous water-power, including the mill, mill-race, upper dam, and all the privileges and the appurtenances to the same belonging, being the same formerly owned by Hamilton & Taber, for the purpose of constructing and maintaining, appurtenant thereto, water-works, ostensibly for fire protection, and to supply citizens with pure water; and that in pursuance of the said purpose the said defendant erected upon the lands purchased of Cecil & Wilson, and now is maintaining and operating her contemplated water-works, on Eel river in the said city, immediately above the plaintiffs' aforesaid property, consisting of a pump-house, with all needed machinery, deep wells, and water pipes, extending from the said pump-house and wells into all parts of the said city of Logansport, by means whereof the said defendant is daily and continuously drawing and diverting from the said Eel river, above the plaintiffs' said dam and water-power, immense quantities of water, to wit, ——— gallons, twenty-five horse-power per day, which said water is permanently diverted from the said Eel river and never returned thereto; that the defendants are now, and have been for more than five years immediately past, diverting each and every day, from the said Eel river, above the plaintiffs' said property, fully ——— gallons, the same being equal to twenty-five horse-power, which said water is sold to sundry and divers citizens of the said city of Logansport for sundry purposes, for which the defendant, the said city, has received and still annually receives ten thousand dollars; that the defendant, the city of Logansport, is threatening, and intends to and will maintain and operate said water-works, and permanently divert the water of Eel river as aforesaid forever; that the quantity of water thus permanently diverted from the said Eel river is yearly increasing as the said city increases in population, as manufactories increase in numbers and capac-

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ity, and as the demands of the citizens for water increase; that there is great danger of the defendants, ultimately and before many years, diverting such large quantities of water from Eel river in the manner aforesaid as to materially injure and damage the plaintiffs' said water-power, and finally destroy it.

"Plaintiffs also aver that they are preparing to use and utilize part of their said water by selling or leasing all of the same not now utilized and used by themselves to manufacturers who contemplate erecting extensive manufactories upon the said property, and are now intending and are ready to do so, but are prevented from so doing by the aforesaid wrongful acts of the defendants, to the annual damage of the plaintiffs in the sum of two thousand dollars.

"Plaintiffs also aver that they have not, nor has either of them, nor has any of their grantors, at any time, in any manner, granted the defendants, nor anybody else, in any capacity, their consent, permission, license, or privilege in any manner or form, to divert any water from Eel river above their aforesaid property, nor has either of the defendants, in any manner, at any time, acquired the right to divert water from said Eel river above the plaintiffs' aforesaid property.

"While the plaintiffs hereby and at all times deny the right of the defendants or anybody to divert water from the said Eel river without plaintiffs' consent, they hereby consent that the defendants may, through their said water-works, at times of fire and for the purpose of suppressing fires, divert the water from said river in all needed quantities for said fire purposes. They do this as citizens of Logansport interested in her prosperity, and willing thus to contribute to the public good in times of public calamity.

"Plaintiffs also aver that after the completion of the said works, the defendant, the city of Logansport, duly established, according to law, a board of three trustees of the said water-works; that the aforesaid William H. Johnson, Thomas Austin and Alfred U. McAllister are the duly elected, quali-

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fied and acting trustees of the water-works of the city of Logansport aforesaid, and hence are made defendants of this action. Wherefore the plaintiffs pray that upon the final hearing of this cause, the defendants, their agents and their employees be perpetually restrained and enjoined from diverting water from said Eel river, at any time, except during times of fire for fire purposes, and that the plaintiffs have all other proper relief."

The second paragraph repeated, in a general way, but more in detail, the facts contained in the first paragraph, with the additional averments that the plaintiffs never became aware of the extent of the injury inflicted upon them until a short time before the commencement of this suit, and that the city of Logansport had never, by resolution, ordinance or otherwise, fixed or determined the amount of water it desired or intended to divert from Eel river to supply its water-works, so that the plaintiffs had been unable to take the initiative to have their damages assessed.

Demurrers to both paragraphs of the complaint were severally overruled, and issues were then formed upon them.

At the hearing, the circuit court made a general finding for the plaintiffs, and decreed that, unless the city of Logansport should, within the period of one year thereafter, cause the plaintiffs' damages to their mill property to be assessed, the defendants would, after the expiration of that time, stand and be enjoined from diverting water from Eel river, except for the purpose of extinguishing fires.

Error is first assigned upon the overruling of the demurrer to the first paragraph of the complaint, and in support of that assignment of error it is argued that upon the facts averred in that paragraph the appellees have been guilty of *laches* in the enforcement of their right to an undisturbed flow of water in Eel river, and have practically estopped themselves from all claim to relief by injunction by their delay in the commencement of this action.

In response to that argument, it is contended that the ap-

appellees' right to an unobstructed flow of water in the channel of Eel river, above their mill, is one so firmly secured to them by the Constitution that it can neither be abridged nor taken away from them except by proper proceedings to assess their damages, or by the adverse use of the water for a period of twenty years, and that hence no *laches* can be imputed to them in consequence of their delay in bringing this action. It is also contended that the paragraph in question is good as a complaint for, at least, nominal damages, as well as a complaint to have the appellees' title quieted. But the paragraph made no demand, and did not purport to be a complaint for damages; neither was any question of adverse title presented by the facts it contained. The appellees and the city of Logansport are shown to be riparian proprietors of land, under undisputed titles, upon the same watercourse. As applicable to such riparian proprietorships, Washburn on Easements and Servitudes, at page 286 (3d ed.), says: "Now the rights of a riparian proprietor of land, over which there is a flowing stream of water, are to use it for any and all lawful purposes, while it is passing, in its natural current, over his land. But the specific water that may be thus passing is not his property except through its use; nor has he a right to detain it otherwise, since the rights of all riparian proprietors upon any stream, in respect to the waters thereof, are in the eye of the law, equal and the same. The obligation of any one of these to suffer it to flow to the proprietor below is equally stringent and imperative as his right was to have it flow to him from the proprietor above."

The right of a riparian proprietor to have the water in the stream above flow to him is usually denominated a "natural easement," but it is not strictly an easement, since an easement rests upon some supposed grant or title by prescription. It is rather a natural right *incident*, and not *appurtenant*, to the land. It is, however, an absolute and inseparable incident to the land, which can only be lost by grant or by twenty years adverse possession. Washb. *supra*, 21, 287.

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The city of Logansport, by its purchase of the upper mill-dam, mill-race, water-power and appurtenances, which had formerly belonged to Hamilton & Taber, succeeded to all the rights pertaining to an upper mill-owner on the same stream with the appellees. Where two or more owners of mill property upon the same stream shall have severally occupied their premises with hydraulic works of art, each has the right to make use of the water in a reasonable manner, having reference to a like right in the other or others, and to the rights of other riparian proprietors, and when a question arises as to what ought to be considered such a reasonable use, it becomes a matter for judicial inquiry.

Washburn, referring to these relative rights of mill-owners, on page 347, further says: "A large proportion of the cases, where conflicting rights are set up by such mill-owners to the use of water, will be found to have been determined by the application of this broad rule of what is a reasonable use in view of the circumstances of each particular case. What a reasonable use of water may be, in any given case, depends upon the subject-matter of the use; the occasion and manner of its application; its object, extent, necessity, and duration; and the established usage of the country, the size of the stream, the fall of water, its volume and velocity and prospective rise and fall,—all of which are important elements to be taken into account in determining the question." We have said this much on the subject of the rights of riparian proprietors and mill-owners upon the same stream to illustrate more thoroughly, that upon the facts stated in the paragraph of complaint under consideration, no question of title was presented, but that the only question which arose upon those facts was whether the city of Logansport had made, and was likely to continue to make, an unreasonable, and hence wrongful, use of the water flowing in Eel river above the appellees' mill-privileges, which the parties were and are entitled to use in common between them. Gould Waters, sections 205, 206,

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207, 208, 209; Goddard Easements, 296, *et seq.*; Angell Watercourses, sections 93a, 444, *et seq.*

It has been held, and often-times reiterated by this court, that the sufficiency of a complaint must be judged of, and issues upon it formed, with reference to some particular theoretical right of recovery, and that the theory upon which a pleading has been framed must be determined from the general tenor and scope of its averments. *W. U. Tel. Co. v. Reed*, 96 Ind. 195; *Sims v. Smith*, *ante*, p. 469.

The general tenor and scope of the paragraph before us show it to be in the nature of a complaint for an injunction, and the relief granted at the final hearing was upon the theory that the complaint, as a whole, constituted a complaint for an injunction. The paragraph, therefore, must be considered as a complaint for an injunction, and an injunction only.

The granting or refusal of an injunction rests, in each particular case, in the sound discretion of the court. An injunction ought not, therefore, to be granted when it would be against good conscience, or productive of great hardship, oppression or injustice, or of public or private mischief. 1 High Inj., section 15; Goddard, *supra*, 368; *Sheldon v. Rockwell*, 9 Wis. 158; *Pettibone v. LaCrosse, etc., R. R. Co.*, 14 Wis. 479; *Cobb v. Smith*, 16 Wis. 692; 2 Barb. Ch. Pr., section 608, n. 4; *Owen v. Field*, 12 Allen, 457; *Reddall v. Bryan*, 14 Md. 444.

The discretion thus conferred in proceedings for an injunction must, it is true, be exercised according to the recognized principles of equity jurisprudence, but it is nevertheless a discretion to be used in promoting the ends of justice and a sound public policy.

As regards the effect of unreasonable delay in bringing suits of the class to which this belongs, Pomeroy in his work on Equity Jurisprudence, states the doctrine to be, "Acquiescence in the wrongful conduct of another by which one's rights are invaded, may often operate, upon the principles of and in analogy to estoppel, to preclude the injured

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party from obtaining many distinctively equitable remedies to which he would otherwise be entitled. This form of *quasi* estoppel does not cut off the party's title, nor his remedy at law; it simply bars his right to equitable relief, and leaves him to his legal actions alone." Section 817.

This doctrine of acquiescence as a *quasi* estoppel is one of general application in proceedings to restrain the wrongful acts of another, and to which effect has been given in numerous cases arising out of controversies concerning the use, or right to use, water in flowing streams. But to make acquiescence effective to such an extent, it must necessarily have been voluntary, and with knowledge of the wrongful acts complained of, and of their probably injurious consequences.

High on Injunction states the rule to be that "One who has by his own acts consented to or acquiesced in the use of water in a particular manner, will be estopped from afterwards enjoining its use in that manner. Thus, where complainant without objection has stood by and allowed defendant to erect a mill in violation of the terms of his grant to defendant of the right to use the water in a particular manner, he is by his silence debarred from any relief against such diversion of the water. * * * * *

"Upon similar principles it is held that long acquiescence on the part of the proprietors of a water-power in a certain measurement of water to which defendants are entitled, will preclude the proprietors from obtaining relief by injunction against such measurement or use of the water, especially where erections have been made by defendants at considerable expense, which would be almost a total loss in case the injunction should be granted. So acquiescence on the part of plaintiffs in the deprivation of water, which they afterwards seek to enjoin, may estop them from obtaining relief in equity. Thus, where defendants were entitled by an act of parliament to use water from plaintiffs' canal for a particular purpose, but for no other, and they had been for many years permitted by plaintiffs to use the water for other purposes, and [who?] then

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sought to enjoin such use, an interlocutory injunction was refused, even though plaintiffs had established their right by an action and judgment at law. And when it is sought to enjoin defendants from keeping their dam closed in such manner as to prevent the flow of water to plaintiff's mill, but plaintiff has delayed proceedings for a period of more than three years after the erection of the dam, he will not be allowed an injunction. And the fact that the damages sustained may be recovered at law affords additional ground for refusing equitable relief in such case." 1 High Inj., sections 884, 885.

In the case of *Attorney General v. New York, etc., R. R. Co.*, 24 N. J. Eq. 49, it was held that where the construction of an important public work has been permitted to proceed almost to completion, in full view of all the parties who could be affected by its construction, and large expenditures have been made, and liabilities incurred, and no action is taken to prevent the progress of the work for more than fourteen months, a court of chancery would not enjoin the further prosecution of the work.

In the case of *Traphagen v. Jersey City*, 29 N. J. Eq. 206, it was further held that where a suitor seeks to have a public improvement enjoined, he must not only show that some right secured to him has been violated, and that he has no other adequate remedy, but he must also apply promptly, and that where, by his *laches*, he has made it impossible for the court to enjoin his adversary without inflicting great injury upon him, an injunction will be refused, and he will be left to pursue his ordinary remedy at law. A similar doctrine was announced in the cases of *State v. Paterson*, 40 N. J. L. 244, and *Rettinger v. Passaic*, 45 N. J. L. 146. Kerr on Injunctions (star p. 201) declares that "Parties who, possessing full knowledge of their rights, have lain by, and by their conduct have encouraged others to expend moneys or alter their condition in contravention of the rights for which they contend, can not call upon the court for its summary interference."

This doctrine has been recognized by this court in general

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terms by the cases of *Palmer v. Stumph*, 29 Ind. 329, *Hellenkamp v. City of Lafayette*, 30 Ind. 192, and *City of Lafayette v. Fowler*, 34 Ind. 140. See, also, the case of *Ricketts v. Spraker*, 77 Ind. 371, and the authorities there cited.

In commenting, however, upon the first three of these last named cases, it is insisted by the appellees that they are in principle, and hence in legal effect, overruled by the more recent case of *Cox v. Louisville, etc., R. R. Co.*, 48 Ind. 178, in which it was held that a land-owner, abutting upon a street in the city of Lafayette, was entitled to an injunction against a railroad company, to restrain it from the use of the street until his damages were assessed and paid, where the application was made many years after the appropriation of the street and the construction of the company's line of road. But in that case no question was made upon the delay in bringing the suit, and nothing was either said or decided touching the effect of Cox's long acquiescence in the wrongful acts of which he complained. The case was made to turn upon another and wholly different question. It is only fair to assume that if Cox's acquiescence had been interposed as an objection, it would have been held that his application came too late. It is further insisted that, under our code, the question of the plaintiff's unreasonable delay in the commencement of his action can not be raised by a demurrer to the complaint, and the case of *Harper v. Terry*, 70 Ind. 264, is relied upon as sustaining that construction of the code. In that case, it was reaffirmed that where lapse of time is relied on as a defence to an action, it must generally, under our code of procedure, be pleaded as a defence, and be based upon some statute limiting the action. That is undoubtedly the proper construction of the code when lapse of time is relied upon in an ordinary action as a defence, but the enforcement of a right by injunction constitutes what is known as an "extraordinary remedy," and the rules governing ordinary civil actions are not in all respects applicable. In a case like this, lapse of time is neither technically nor in any proper sense a

matter of *defence*. It is of the essence of the application, that it has been made within proper time, and when it is shown upon the face of the complaint that there has been unreasonable delay, advantage may be taken of that infirmity in the application by demurrer.

It is further insisted that as the right of the appellees to have their damages assessed before any water could be lawfully diverted from the channel of Eel river, was a right reserved to them by the Constitution, it was one which could not have been impaired by any lapse of time less than twenty years, and that, in consequence, the doctrine of the text-writers and decided cases on the subject of acquiescence in the deprivation of ordinary property rights, to which we have referred, has no application to this or any similar case.

Any merely personal right reserved by the Constitution may be as readily waived as any other well recognized right. Every suitor is entitled under the Constitution to a speedy trial, but it is a right which may be waived by asking for and obtaining a continuance of his cause. In all criminal prosecutions, the accused has a constitutional right to a public trial by an impartial jury in the county in which the offence with which he is charged may have been committed, and yet he might consent to a secret trial and to be tried by a jury entertaining prejudices against him. A failure to object to a juror, at the proper time, on account of his partiality, operates as a waiver of the accused's right to complain that the juror was not impartial. *Adams v. State*, *ante*, p. 244; *Murphy v. State*, 97 Ind. 579.

The applying for and obtaining of a change of venue amount to a waiver of the right to be tried in the county in which the offence was committed. *Butler v. State*, 97 Ind. 378.

The accused may also waive his right to be furnished with a copy of the charge against him by failing to demand that he be supplied with a copy. He may waive his right to have the witnesses meet him face to face by consenting that their depositions may be taken and read at the trial. After a ver-

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diet has been rendered against him, he may waive his right not to be again put in jeopardy for the same offence by moving for and obtaining a new trial. On what theory, therefore, can it be maintained that the right of the appellees to have their damages assessed before any injury was inflicted upon them may not be as readily waived as those guaranteed to a person under a prosecution involving perhaps his life or his liberty? We know of none, and accordingly hold that the appellee's right to purely equitable relief was one which was liable, from the first infringement, to be lost by unreasonable delay in its enforcement.

Upon the facts stated, to which we are required to give a construction, the appellees have been, and are likely hereafter to be, injured by the diversion of water by the appellants from the channel of river above them. This right of a riparian proprietor or mill-owner to have the water flow to him from the stream above is one which may be taken into account in the assessment of damages to real estate to which it is incident. Washb. *supra*, 446; Gould Waters, section 245.

The appellees might, therefore, at the proper time, have caused the city of Logansport to be enjoined from diverting water from their mills until their damages were assessed and paid. *Sidener v. Norristown, etc., Turnpike Co.*, 23 Ind. 623; *Cox v. Louisville, etc., R. R. Co.*, *supra*, and authorities there cited. How long this equitable remedy remained open to them we need not now inquire, since such an inquiry is not necessarily involved in the decision of this cause. The inference is plain that the appellees had knowledge of every step taken by the city of Logansport looking to the erection and maintenance of its water-works, and of the consequent diversion of water which was likely to ensue. With this knowledge, no resistance seems to have been made. This justifies the conclusion that the acquiescence of the appellees in all that was done pertaining to the water-works was, in all respects, a voluntary acquiescence, and has been for a length

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of time and under circumstances which utterly preclude any claim to equitable relief by injunction. Nothing, therefore, of a remedial character remains to the appellees except their right to compensation for damages presumably already and hereafter to be sustained.

This right to compensation may be enforced either by actions for damages or by causing their damages to be assessed under section 909, R. S. 1881, which, in its general scope and spirit, extends to both lands and water taken for water-works under the right of eminent domain. As to the measure of damages in a case like this, reference is made to the case of *Cowdrey v. Inhabitants of Woburn*, 136 Mass. 409.

The following cases are also cited as having a bearing on some of the questions discussed in this opinion: *Goodin v. Cincinnati, etc., Canal Co.*, 18 Ohio St. 169; *Birmingham Canal Co. v. Lloyd*, 18 Vesey Jr. 514; *Rochdale Canal Co. v. King*, 2 Sim. N. S. 78; *Thomas v. Woodman*, 23 Kan. 217 (33 Am. R. 156); *Burden v. Stein*, 27 Ala. 104; *Morris, etc., R. R. Co. v. Prudden*, 20 N. J. Eq. 530; *Jones v. City of Newark*, 3 Stockton, 452; *Bowman v. Wathen*, 42 U. S. S. C. (1 How.) 189; *Blanchard v. Doering*, 23 Wis. 200; *McQuiddy v. Ware*, 20 Wall. 14; *Haight v. Price*, 21 N. Y. 241; *City of Logansport v. LaRose*, *ante*, p. 117.

No argument has been submitted upon the sufficiency of the second paragraph of the complaint. We, consequently, make no formal ruling upon its sufficiency.

As the judgment appealed from seemingly rests upon both paragraphs, it will in any event have to be reversed for error in overruling the demurrer to the first paragraph.

If the circuit court shall be called upon to reconsider the question of the sufficiency of the second paragraph, it will keep in view the principles and conclusions herein above announced.

The judgment is reversed, with costs, and the cause re-
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City of Logansport v. Uhl *et al.*

manded for further proceedings not inconsistent with this opinion.

Filed Feb. 19, 1885.

ON PETITION FOR A REHEARING.

NIBLACK, J.—There were two trials of this cause in the circuit court, the first resulting, as did the second, in a finding and judgment in favor of the appellees.

After the first judgment was entered, the appellants asked for, and as an alleged matter of right, and over the objection of the appellees, obtained, an order setting it aside and granting a new trial in the cause, upon the theory that the proceeding was, in its main features, an action to quiet title to real estate.

Upon the completion of this appeal, the appellees assigned cross errors upon the decision of the circuit court thus setting aside the first judgment and granting a new trial.

Accompanying their petition for a rehearing, the appellees have submitted an argument elaborately repeating and earnestly emphasizing their original assumption that this was primarily an action to quiet title, and only incidentally for an injunction. They claim, in connection with other arguments, that as the appellants participated in the first trial, and obtained a new trial as an alleged matter of right on that theory, they are now precluded from asserting that the action was not to quiet title, and that we are hence constrained to consider it here as an action prosecuted for the principal purpose of quieting title. But it is by the general tenor and scope of the pleadings, and not by what may have been said or done at the trial, that the real nature of the action must be determined. See *W. U. Tel. Co. v. Reed*, *supra*, and *Sims v. Smith*, *supra*.

For the reasons given at the former hearing, we adhere, with unabated confidence, to the conclusion then reached, that this was simply and only a suit for an injunction, and not, in any just or proper sense, an action to quiet title to real estate.

The appellees, conceding our possible adherence to our former conclusion that this was not an action to quiet title, contend, with apparently much confidence, that our theory as to the essential nature of this action leads us, inevitably, to a reversal of the judgment last rendered, and of the order granting a new trial as a supposed matter of right, and to an affirmance of the first judgment. When, however, a judgment is reversed for error intervening, the reversal extends back to and includes the first available error in the proceedings below. In this case the first error with which we were confronted was the overruling of the demurrer to the first paragraph of the complaint, and to reach that error all subsequent proceedings had to be annulled and set aside.

It is further contended that upon the facts averred it ought not to have been inferred that the appellees had notice, for any considerable length of time before the commencement of this suit, of the great and increasing amount of water which the appellants intended to use, and were likely to divert from the channel of Eel river, and that hence we erred in holding that the appellees had acquiesced for an unreasonable time in the diversion of the water complained of before commencing this proceeding for relief.

This argument is based, seemingly, upon a confusion of some of the facts testified to at the trial, with the averments of the first paragraph of the complaint. As has been stated, that paragraph charged that at the time it was filed the appellants were, and for more than five years then last past had been, daily and continuously, diverting large quantities of water from Eel river, equal in force to twenty-five horsepower, and it was from that allegation that our inference as to the fatal acquiescence of the appellees was drawn.

The petition for a rehearing is overruled.

Filed April 4, 1885.

Dessar *et al.* v. Field.

No. 11,222.

DESSAR ET AL. v. FIELD.

BILL OF SALE.—*Assignment for Benefit of Creditors.*—*Fraud.*—A writing, by which an insolvent merchant transfers his entire stock in trade and notes and accounts to a creditor, providing that when turned into money any proceeds beyond satisfying the creditor shall be paid to the merchant, is not an assignment under the statute, but is a bill of sale, and is not fraudulent in law.

From the Owen Circuit Court.

N. Morris, L. Newberger, D. E. Beem and W. Hickam, for appellants.

S. O. Pickens, W. H. Pickens and I. H. Fowler, for appellee.

ZOLLARS, J.—Appellee, Field, was engaged in merchandising, and, not having sufficient credit, was allowed to buy goods on the credit and in the name of Thomas A. McNaught. This arrangement continued until the liability of McNaught amounted to near \$6,000, when Field turned over to him and put him in possession of his stock of goods, store fixtures, notes and book accounts. This was done at a time when Field was insolvent. Appellants were creditors of Field when the transfer was made. In this action, they seek to attack and overthrow the transfer to McNaught, as fraudulent and void as to them.

It is not insisted that there was fraud in fact, but it is claimed that the written instrument, by which the transfer was made, was and is fraudulent and void in law. The portion of the written instrument necessary to be noticed is as follows: "This agreement is to the following effect, to wit: Whereas, T. M. Field, in his business, has contracted indebtedness in the name of T. A. McNaught, and for which said McNaught is liable to the creditors, said indebtedness amounting to something near six thousand dollars or more; and whereas, judgments have been taken on a large part of said indebtedness, and creditors are pressing their claims for collection; and whereas, said indebtedness, as between said

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Field and said McNaught, is the indebtedness of said Field, contracted as aforesaid in the name of said McNaught: Now, therefore, to adjust said indebtedness as between said Field and said McNaught, said Field has this day sold and transferred to said McNaught, all his right, title, interest, and claim in and to his dry goods store, consisting of dry goods, clothing, boots and shoes, notions, and the tailoring business, and his entire stock of goods of every description, * * * and also all the notes and book accounts of said Field, which he hereby agrees to assign and transfer to said McNaught. And in consideration of said goods, notes and accounts, so sold, delivered, assigned and transferred as aforesaid, said McNaught assumes to pay said indebtedness so contracted as aforesaid by said Field for the use and benefit of said Field, and in the name of said McNaught; and as between said Field and said McNaught, said Field is to be exonerated and discharged from all liability to said McNaught on account of said indebtedness contracted as aforesaid. * * * It is further agreed between the parties hereto that if said goods * * * shall not amount to a sum sufficient to pay said indebtedness, * * * the said Field is to pay any deficiency which said goods * * * may fail to pay, after they shall be turned into money. * * * And it is further agreed, that if a sum greater than is necessary to pay said indebtedness shall be realized from said goods, * * * then, any excess is to be paid over to said Field."

The contention of appellants is that the whole transaction is fraudulent and void in law, because of the provisions in relation to the payment of any deficiency by Field, and the payment to him of any surplus that may be realized from the goods, etc., by McNaught.

Their argument rests upon the assumption that the written instrument is an assignment, and that because a possible surplus is reserved to the debtor, although, in fact, there is none, the whole transaction was rendered void in law. If their assumption were conceded, it would not necessarily follow that

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their conclusion is correct. *McFarland v. Birdsall*, 14 Ind. 126; *New Albany, etc., R. R. Co. v. Huff*, 19 Ind. 444.

The instrument, however, is in no sense an assignment for the benefit of creditors. It has none of the formalities required by the statute. McNaught was not required to, and did not, proceed in the manner provided by the statute in cases of assignment. It is manifest that the parties did not, in any sense, regard the transaction as an assignment under the statute or otherwise. There would be more propriety in treating the written instrument as a chattel mortgage than to treat it as an assignment. Regarded as a chattel mortgage, there is nothing upon the face of it to render it void. The general rule is that fraud, as connected with the execution of a chattel mortgage, is a question of fact and not of law. *McFadden v. Hopkins*, 81 Ind. 459; *Morris v. Stern*, 80 Ind. 227; *Lockwood v. Harding*, 79 Ind. 129; *McLaughlin v. Ward*, 77 Ind. 383. We can discover no reason why the instrument may not be treated just as the parties treated it, and thus carry out the intent of the parties, which, in each case, is the essence of the contract. The written instrument purports to be, and we think is, a bill of sale, which conveyed to McNaught the title to the goods, etc., with the absolute power of disposal as he might choose.

The consideration was the payment of debts which, as between him and Field, were not his debts. To the amount of the goods, etc., when reduced to cash, Field was relieved from all liability to McNaught. The fact that the value of the goods, etc., was to be measured and fixed by the amount that might be realized from them, did not render the sale fraudulent and void as a matter of law; nor did the stipulation that McNaught should account to Field for the surplus, if any, over the amount of his liability.

Whatever view may be taken of the written instrument, no court would be justified in holding that upon its face it was fraudulent and void. We have not gone into a review of the evidence, because the trial court decided that it did not es-

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tablish any charge of fraud, and in that decision appellants, so far as disclosed in argument, acquiesced. We may remark, however, in passing, that there is nothing in the evidence that would justify this court in overthrowing the judgment of the court below.

The judgment is affirmed, with costs.

Filed Sept. 17, 1884. Petition for a rehearing overruled April 7, 1885.

No. 11,364.

THE BEDFORD, SPRINGVILLE, OWENSBURG AND BLOOMFIELD RAILROAD COMPANY v. RAINBOLT.

RAILROADS.—Negligence.—Defective Bridge.—Pleading.—In a suit against a railroad company for injury resulting from its negligence, an express averment that the plaintiff was guilty of no contributory negligence is not necessary, if that fact otherwise appears, *e. g.*, as where it is averred that while the plaintiff, being a passenger, was seated in the defendant's coach, the coach, by reason of the defendant's negligence, broke through a bridge, whereby, etc.

SAME.—Care Required to Protect Passengers.—Presumption.—Evidence.—Proof that a railroad passenger was injured by the train breaking through a bridge raised a presumption of negligence by the carrier, which may be rebutted by proof. The slightest negligence in such case imposes liability, the care required being the greatest that is practicable in keeping the machinery and bridges in safe condition, consistent with what are the known means of attaining that end.

SAME.—Instruction.—In the absence of proof that the safety of a properly constructed railroad bridge may depend upon the soundness of a single iron rod, the jury should not be instructed that if the bridge broke down because of a defect in such single rod, which was not discoverable, and the injury resulted therefrom, there could be no recovery.

PRACTICE.—Venire de novo.—Answers to Interrogatories.—Cases Modified.—Where the general verdict is in proper form, a failure of the jury to answer interrogatories does not authorize a *venire de novo*. *Peters v. Lake*, 55 Ind. 391, and *Carpenter v. Galloway*, 73 Ind. 418, modified.

SAME.—Evidence.—Rebutting.—Evidence which controverts that of the defendant as to particular facts is proper in rebuttal, though the same evidence would also have been proper as part of the plaintiff's original case.

From the Owen Circuit Court.

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128	405
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136	471
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141	546
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155	95
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The Bedford, Springville, Owensburg and Bloomfield R. R. Co. v. Rainbolt.

M. F. Dunn, G. G. Dunn, A. G. Cavins and E. H. C. Cavins, for appellant.

E. E. Rose and E. Short, for appellee.

MITCHELL, J.—Solomon Rainbolt, on the 8th day of November, 1881, became a passenger on one of the trains of the Bedford, Springville, Owensburg and Bloomfield Railroad Company, to be carried from Switz City to Bedford.

While being thus carried, the car in which he was seated, together with the train by which he was proceeding, was precipitated into White river while passing over an iron or combination bridge built or used by the company. He sustained severe, and it is claimed permanent, injuries by the fall, and from being involved in the wreck of the train in the river.

His complaint for damages is in three paragraphs, which are in no material respect different from each other.

Preceded by the formal averments, the default of the railroad company is averred in the first paragraph, as follows: "That by the carelessness, negligence and default of its agents and employees, and for want of due care and attention to its duty in that behalf, the said cars broke through the railroad bridge across White river." And in the second as follows: "That by the carelessness, negligence and default of its agents, servants and employees, and for want of due care and attention to its duty in that behalf, the locomotive and cars were run upon and through the railroad bridge," etc. And in the third as follows: "That said defendant did, by its servants, agents and employees, carelessly and negligently conduct the running of said cars, and was so in default in the care and oversight of said railroad and bridges thereon, that said cars were ran upon the railroad bridge over and across White river, said bridge being, as defendants knew, insecure, and were thereby thrown into White river." Each paragraph concluded with an averment of the injuries sustained, and a claim for damages.

The trial resulted in a verdict and judgment, over a motion

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for a new trial, for the plaintiff, from which judgment the appellant prosecutes this appeal.

The argument of appellant's counsel embraces four points:

1. That the complaint is not sufficient, for failing to show, either by direct averment or by its statement of facts, that the appellee was himself without fault. For this alleged error, it is contended, the motion in arrest of judgment should have been sustained, there having been no demurrer to the complaint.

2. That by reason of the failure of the jury to make direct answers to some of the interrogatories propounded, a *venire de novo* should have been awarded.

3. That the court erred in giving, and refusing to give, certain instructions to the jury. A summary of those given and complained of, and those refused, will be found farther on.

4. That certain testimony admitted on behalf of the appellees as rebutting evidence was incompetent.

Concerning the first point, we have to say that while it is, and ought to be, the rule, that in actions for damages growing out of the alleged negligence of another, it must always be made to appear from the complaint, either by direct averment or by the statement of the facts and circumstances under which the injury occurred, that the plaintiff was without contributory fault or negligence, we are of the opinion that the complaint in this case is, nevertheless, sufficient within that rule.

The averment that the injury occurred in a given case without the fault or negligence of the plaintiff is not always controlling; nor is the absence of such averment in every case to be taken as a failure to aver due care.

Taking all the allegations of a complaint together, and notwithstanding the formal negative averment, the presumption of contributory negligence may appear, as in the cases of *President, etc., v. Dusouchett*, 2 Ind. 586, *Riest v. City of Goshen*, 42 Ind. 339, and other cases, or conversely, as in *Duffy v. Howard*, 77 Ind. 182, and cases there cited.

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From the averments in the complaint, in this case, it must be taken that the appellee was lawfully a passenger on the appellant's train of cars, presumably submitting to its rules and regulations as such. The giving way of the railroad bridge, over which the train was passing, precipitated him violently into the river below, inflicting upon him the injuries complained of, and it must be held from the situation in which the appellee is shown to have been, the relation which he occupied toward the railroad company, which relation placed him under no duty except to remain passive in its hands while being carried, that all presumption of negligence on his part is rebutted by the averments of the complaint. *Mitchell v. Robinson*, 80 Ind. 281 (41 Am. R. 812); *Michigan Southern, etc., v. R. R. Co. v. Lantz*, 29 Ind. 528.

It is suggested in the argument, that it does not appear, but that he may have conducted himself negligently after the bridge went down, in the endeavor to extricate himself from the wreck, etc.; but we are not disposed to hold that a passenger who without fault becomes involved in a disaster of the apparent magnitude of that here described, should be required to aver or prove that he acted with prudence and deliberation while so involved. The court committed no error in overruling appellant's motion in arrest.

Was it error to overrule the appellant's motion for a *venire de novo* as contended in counsel's second point? If the question was properly raised in the record, the answer to it would depend upon whether the interrogatories, the answers to which are complained of, were pertinent and direct, and whether such answers are uncertain, indefinite or evasive.

The question of the sufficiency of the answers to the interrogatories is not properly raised by a motion for a *venire de novo*. A *venire de novo* can only properly be awarded where the verdict of the jury is so imperfect that a judgment can not be rendered thereon.

The general verdict, however, when in proper form, covers

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all the issues in a given case, and it can not be said, because an answer to an interrogatory returned with a general verdict, properly framed, is indefinite, uncertain or ambiguous, that, therefore, there is either a failure to find on all the issues, or that there is an ambiguity in the finding or verdict of the jury. Until overthrown by a special finding, absolutely inconsistent with it, the general verdict stands, and the judgment which follows is supported by it, and does not in any manner depend for support on the special interrogatories. By failing to observe the distinction between a special verdict or special finding of facts, and answers to interrogatories propounded to the jury. Some of the cases have held that the failure of the jury to make certain and definite answers to interrogatories may be a cause for a *venire de novo*, but the proper way of saving the question in such case is indicated in *West v. Cavins*, 74 Ind. 265, *McElfresh v. Guard*, 32 Ind. 408, and *Ogle v. Dill*, 61 Ind. 438. These cases hold that a failure of the jury to make definite answers to interrogatories, where there is a general verdict returned, is not proper ground for a *venire de novo*, and what is said in *Peters v. Lane*, 55 Ind. 391, and *Carpenter v. Galloway*, 73 Ind. 418, indicating a different rule, may be regarded as modified by the later cases.

We have examined the questions propounded to the jury, and their answers, and while some of them are not answered directly, we are, nevertheless, of the opinion, considering the character and construction of the questions, that the answers can not be said to be improper. For the reasons mentioned, there was no error in the ruling of the court in overruling the motion for a *venire de novo*.

The next point argued is that the court erred in giving, of its own motion, instructions numbered 8, 9, 11 and 12, and in refusing to give the appellant's instructions, prayed for, numbered 4, 5 and 7. That we may not extend this opinion beyond bounds, we give only the substance of the instruc-

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tions complained of, which were given by the court, embracing all that is material to present the questions raised :

In the eighth instruction the jury were told, in substance, that if they should find from the evidence that the plaintiff was injured by an accident arising from a defect in the road or bridge of said company, without any fault on his part, the legal presumption is that the injuries of the plaintiff were caused by the negligence of the defendant, and that this presumption might be overthrown by proof that the injuries complained of resulted from inevitable accident, or from something against which no human prudence or foresight could provide.

And in the ninth the jury were told, in substance, that while a carrier does not, in legal contemplation, warrant the absolute safety of passengers, it is yet bound to the exercise of the utmost diligence and care, and that the slightest neglect against which human prudence and foresight may guard, and by which hurt or loss is occasioned, will render it liable to answer in damages; and that the law imposed upon a common carrier the duty of providing strong and sufficient carriages or cars for the journey, and good and sufficient track, culverts and bridges for said carriages or cars to pass over, and to provide conductors and other agents whose duty it is to use every precaution against danger, and that it was bound to take notice of the manner in which its road and the bridges are constructed, and the plan and size thereof, and whether they are of such size and built on such plan as are required for the safety of their passengers. It also contained, substantially, the same instruction as to the presumption of negligence and burden of proof as the eighth.

The eleventh and twelfth instructions were as follows:

"11th. If you find from the evidence that the accident was occasioned by a condition of things which the company could neither foresee nor provide against, then you should find for the defendant.

"12th. If you find from the evidence that the immediate

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cause of the alleged disaster was the want of the proper construction of said bridge over White river; either as to size, material, piers or the adjustment thereof, then you should find for the plaintiff, unless you should further find that the size and construction of said bridge were right and proper for the use intended, and that the material in said bridge had been properly tested, by tests known to men skilled in such material, or could not be so tested and preserve the strength of said material, and said disaster was caused by a defect in said material which could neither be foreseen nor provided against by human foresight and care, then you should find for the defendant."

The objections which appellant's counsel urge against the foregoing instructions may be comprehended under the following summary :

First. That in laying it down as the law of the case, that if the accident and injury complained of were proved, a legal presumption arose that the railroad company was guilty of such negligence as cast upon it the burden of proving that the disaster occurred without any degree of negligence on its part; and,

Second. That in instructing the jury that the slightest neglect on the part of the railroad company against which human prudence and foresight might have guarded, resulting in the disaster and injury complained of, rendered the company liable, and that it could only be excused from liability by showing that the disaster resulted from a condition of things which could neither be foreseen nor provided against by human foresight and care, the court stated a rule not warranted by the law, and too strict to be reasonably required of a common carrier of passengers.

As respects the burden of proof, we think the instruction of the court was clearly right. The instruction was in all essential particulars the same as that considered in the case of *Pittsburgh, etc., R. R. Co. v. Williams*, 74 Ind. 462. In that

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case, an instruction, directing the jury that where a passenger in a railroad car was, without his fault, injured by the car in which he was riding being thrown from the track, the law will presume negligence on the part of the railroad company, was held to be a correct statement of the law, and the decision is fully sustained by the reasons given and the authorities cited.

Any other rule would, in many cases, leave a passenger who sustained an injury by the defective condition of a railway track or bridge practically without remedy. The contract which the law implies between the carrier and passenger is that the carrier has a safe and sufficient railroad track to the point of the passenger's destination; that its bridges and all the other means provided by it for his carriage are safe, and that all suitable means had been taken beforehand to carry him safely and without hurt to the point indicated. The condition of its cars, track and bridges, and the precautions which it has taken for their security and the safe transport of the passenger, are peculiarly within its own knowledge, and while, in most cases, it would be a denial to the injured passenger of all remedy to require him to show affirmatively wherein the company had failed, it is deemed a just and reasonable rule that the company should take the burden of showing that it used all proper precautions for the passenger's safety. *Philadelphia, etc., R. R. Co. v. Anderson*, 94 Pa. St. 351 (39 Am. R. 787). Some distinction is sought to be drawn by counsel between a "*prima facie* presumption" and a "legal presumption," and it is urged that the jury might well have understood, from being told that a legal presumption of negligence arose from the accident and injury, that such presumption was conclusive. We do not think the criticism justified. As used, we can perceive no difference between a *prima facie* presumption and a legal presumption. In this regard, as well as in respect to the degree of care required of a common carrier toward a passenger, and the condition of things which

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will exonerate it from liability for an injury occasioned to a passenger resulting from a defective track or bridge, the instructions stated the law to the jury with commendable accuracy and precision.

The rule that there may be degrees in negligence has long ago been discarded in this State, and when it is said that an occurrence came about through the slight negligence or gross negligence of another, it is, in either case, nothing more than saying that such person was negligent; and so when the court told the jury that if the injury was occasioned through the slightest neglect of the railroad company, against which human prudence and foresight might have guarded, it would be held liable, it was equivalent to saying that if the appellant, by the exercise of prudence and foresight, might have discovered the defective condition of its bridge, then the neglect to exercise such prudence and foresight, resulting in injury, would render it liable. The addition of the word "human" to the prudence and foresight required neither added to nor detracted from the degree of care required.

The degree of diligence which the law requires of railroad companies, in keeping their track, bridges, culverts and cars in a safe condition, is expressed in a variety of terms in the books, but after a careful examination of the adjudged cases, we have been able to discover none in which a rule less exacting than that laid down by the court in this case was announced. In the maintenance of its track and bridges in a secure condition, the highest degree of practical diligence and care are required on the grounds of public policy. Considering that vast numbers of human beings are daily committing themselves to the care and fidelity of railroad companies, which for an adequate reward engage to transport them with great speed from point to point, any negligence in the maintenance of their tracks and bridges in such condition of safety, as practical skill and sagacity have attained to and applied generally to the subject, should not be tolerated.

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While this rule does not require that common carriers should insure the safety of passengers, nor involve such an imaginary or speculative degree of skill or care as the human mind might conceive of or invent, so as to insure the safety of tracks and structures beyond all peradventure, it does, nevertheless, require that the highest degree of practical care and skill, consistent with the known, usual and approved appliances for that purpose, should be used and properly maintained.

A fair consideration of all the instructions given by the court are within this rule, which is approved, among many others, by the following authorities: *Taylor v. Grand Trunk R. W. Co.*, 48 N. H. 304, and the numerous cases there cited and commented upon; *Toledo, etc., R. W. Co. v. Conroy*, 68 Ill. 560; *Railroad Co. v. Aspell*, 23 Pa. St. 147; *Meier v. Pennsylvania R. R. Co.*, 64 Pa. St. 225; *Galena, etc., R. R. Co. v. Yarwood*, 15 Ill. 468; 2 Rorer R. R., 955, 956, 1086, 1088, and authorities there cited.

Most of the instructions which were asked by the appellant, and refused by the court, were intended to modify the rule of diligence as required in the instructions given by the court, and concerning these nothing need be added to what has already been said on that subject.

The fourth instruction asked by the appellant, and refused by the court, was, in substance :

That if the jury should find from the evidence that the accident was caused by the breaking of any particular rod in the bridge, which had in it an original internal defect, and that said rod, being necessary for the support of the bridge, broke, and that the breaking of said rod occasioned the fall of the bridge and train, and if the rod and bridge had had sufficient tests to justify the company in relying upon its safety, and the defect in the rod was not discoverable by reason of its position in the rod, or in the iron shoe or wood in which it was concealed, then the plaintiff could not recover.

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We think all that is relevant to the case in the foregoing instruction was comprehended in the instructions given by the court. Part of it relates to the degree of vigilance and care to be exercised by the company in the construction and maintenance of the bridge, which was covered by the instructions given by the court. That part of the instruction which proposes the theory that the bridge may have fallen on account of the breaking of one defective rod, is negatived by an answer of the jury to one of the appellant's interrogatories, in which the jury say, in substance, that the fall of the bridge was not caused by the breaking of one single rod. By this answer it is shown that the failure to give the instruction worked no detriment to the appellant; moreover, as we find no evidence tending to prove that this bridge fell by the breaking of one particular rod, or that any properly constructed railroad bridge would be liable to fall by the breaking of any one particular rod, we are not prepared to say, as a matter of law, that a railroad bridge so constructed as to depend for its safety on the integrity of any one rod would be such a bridge as, in the exercise of the degree of diligence required, a railroad company would be warranted in erecting or continuing in use.

Substantially, this instruction asked the court to say, as a matter of law, that if the fall of the bridge resulted from the breaking of any one rod, which had in it an undiscoverable defect, if such rod had been sufficiently tested to justify the company in relying upon it, then it was not responsible.

We find in the record no evidence that a bridge so constructed would be suitable for the important purpose for which this bridge was intended, and if we were obliged to pronounce upon the subject as a matter of law, without evidence to the contrary, we would say that a railroad bridge designed to carry passenger trains over an important river, so constructed as that the giving way of one single rod would

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precipitate it, with its train-load of human beings, in depths below, was not constructed with due care and We do not say that a railroad bridge so constructed not be sufficient, as a matter of law. It may be that neering skill, as practically applied to the construction c road bridges, has discovered nothing better. What we is that until proof is made of this, we can not say, as t struction in question seems to propose, that a bridge s tructed and used is sufficient for the purpose it was int to subserve. We think there was no error in refusin appellant's instructions.

The last point made by counsel for appellant is tha court committed error in permitting the appellee to intr evidence in rebuttal showing the condition of the bridge abutments some time before and at the time of the inju

As the appellant had introduced evidence as part of it fence tending to show that the abutments and bridge we proper condition at and shortly before the injury, we the evidence introduced in rebuttal was competent, and it was not necessarily a part of plaintiff's original case is true, the appellee introduced some evidence as part (original case tending to show the imperfect and unsafe dition of the bridge, but this did not preclude him fr introducing evidence tending to rebut the appellant's ev on particular points, which tended to show that the l and abutments were safe.

We are impressed with the conviction, after readin evidence in the case, that considering the extent of tl injuries actually suffered by the appellee, the damages wer cessive, but this was a matter peculiarly within the prov of the jury, and, as we find no error in the record, the j ment is affirmed.

Filed Jan. 23, 1885.

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Wright *et al.* v. Briggs.

No. 11,264.

WRIGHT ET AL. v. BRIGGS.

MORTGAGE.—Subrogation.—Agreement.—Foreclosure.—W., owning a lot subject to a mortgage duly recorded, conveyed a part thereof to B., in consideration in part of the oral agreement of B. that he would pay the mortgage. W. afterwards conveyed the remainder of the lot for value and with warranty to C., to whom B. at the time affirmed his said promise. C. for value conveyed said remainder to D., informing the latter of B.'s agreement. Afterwards D., to save the lot from sale, was compelled to pay the mortgage.

Held, that B. was personally liable to D. for the amount paid, and to a decree of foreclosure against B.'s part of the lot, to make the same.

From the Superior Court of Marion County.

W. D. Bynum, A. T. Beck, J. E. McDonald, J. M. Butler,
and *A. L. Mason*, for appellants.

F. Winter, for appellee.

BLACK, C.—The appellee sued the appellants, who separately answered by denials. The appellant Bernhamer alone assigns errors, and the assignment requires us to determine as to the sufficiency of the complaint as against him, and as to the correctness of the conclusions of law stated so far as they relate to him.

The facts shown by the complaint and in the special finding, omitting such as affect only the other defendants, were, in substance, as follows:

On the 26th of July, 1876, the defendants Thomas Wright and Amelia S. Wright, his wife, executed a mortgage on a certain lot in the city of Indianapolis to the State of Indiana, for the use of the common school fund, to secure the payment of a promissory note of that date, executed by said Thomas Wright to the State of Indiana for the use of said fund, whereby he promised to pay to said State for said use the sum of \$250, on or before the 26th of July, 1881, with interest at the rate of eight per cent. per annum. Said mortgage and note were duly recorded in the recorder's office of Marion county.

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On the 17th of January, 1877, said Wrights conveyed to the defendant Bernhamer ten feet by parallel lines off of the east side of said lot, and the deed was duly recorded. Bernhamer still owned the real estate so conveyed to him. As part of the consideration to be paid therefor by him to said Wright, Bernhamer, at the time of the conveyance, assumed and agreed to pay said mortgage, and to relieve and release the remainder of said lot from the lien and encumbrance thereof.

On the 25th of January, 1877, said Wrights, in consideration of the sum of \$1,500 to them paid by James A. Briggs, sold and by warranty deed in statutory form conveyed to him all of said lot except the portion thereof previously conveyed to Bernhamer, who, at the time of said purchase by said Briggs and said conveyance to him, stated and represented to said Briggs that he, said Bernhamer, had agreed with said Wrights, as a part of the consideration of the purchase made by him, to assume and pay said mortgage, and he promised said Briggs that he would pay and discharge said mortgage and relieve that part of the lot about to be purchased by said Briggs from the lien and encumbrance thereof; and said Briggs, in reliance upon said statement and promise of said Bernhamer, thereupon made the purchase aforesaid from said Wrights.

On the 29th of October, 1878, said James A. Briggs sold and conveyed said lot, except the portion so purchased and owned by Bernhamer, to the plaintiff Sarah A. Briggs, for the consideration of \$1,000. At and before her said purchase, the plaintiff was informed by said James A. Briggs of said Bernhamer's assumption of and agreement to pay said mortgage, and relied upon his performance of said agreement in making her said purchase.

On the 26th of July, 1881, said mortgage became due and was unpaid, and the plaintiff demanded of said Bernhamer that he pay the same, which he failed to do. In consequence of said mortgage being due and remaining unpaid, the au-

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ditor of said county of Marion was about to advertise and sell said mortgaged premises, including the part thereof owned by the plaintiff, for the payment of said mortgage debt. Thereupon, the plaintiff, on the 18th of October, 1882, to prevent the sale of her said property and relieve it from the lien of said mortgage, was compelled to and did pay to the treasurer of said county \$315, the amount of principal and interest then due and unpaid upon said mortgage, and said auditor thereupon endorsed upon said mortgage that it was satisfied.

The conclusions of law stated by the court, so far as they related to said Bernhamer, were, that the plaintiff was entitled to a personal judgment against him for \$321, and that she was entitled to foreclosure on the portion of said lot so conveyed to said Bernhamer.

When a portion of the lot was conveyed to Bernhamer, and he assumed the payment of the mortgage, which his vendor was personally bound to pay, Bernhamer, as between him and Wright, became the principal debtor, and Wright became his surety. The portion of the lot retained by the mortgagor and afterwards conveyed to James A. Briggs, and by him conveyed to the appellee, also was placed in the relation of surety for Bernhamer. Thomas Wright was still personally bound to the mortgagee, to whom also all the lot was still bound. It does not appear that Bernhamer's assumption was stipulated in the deed received by him, but his oral assumption of the mortgage was sufficient to effect such a result as we have indicated. Jones Mort., section 750 and notes; Pomeroy Eq. Jur., section 1206, note 2. By said assumption the mortgagee became entitled to hold Bernhamer personally liable for the mortgage debt. The mortgagee thus acquired an additional security, the creditor being entitled to the benefit of all securities held by a surety from the principal debtor.

It sufficiently appears from the facts stated that, as between

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Bernhamer and the appellee, the former was in equity and good conscience bound to pay the mortgage debt, and to thereby relieve therefrom the portion of the lot held by the appellee. As she, in order to save her portion of the lot, was compelled to pay the debt which she was not personally bound to pay, and which, as between her and Bernhamer, the latter, in equity and good conscience, was bound to pay, she, by such payment, acquired the right of subrogation to all the rights, remedies and securities that the mortgagee had as against Bernhamer. She, therefore, was entitled not only to foreclose the mortgage upon the portion of the lot owned by Bernhamer, but also to obtain personal judgment against him for the amount paid by her for which, under his contract of assumption, he was bound. Pomeroy Eq. Jur., sections 1206, 1207; Jones Mort., sections 741, 743, 748; *Cole v. Malcolm*, 66 N. Y. 363; *Vrooman v. Turner*, 69 N. Y. 280; *Johnson v. Harden*, 45 Iowa, 677; *McCormick v. Irwin*, 35 Pa. St. 111; *Mosier's Appeal*, 56 Pa. St. 76; *Rardin v. Walpole*, 38 Ind. 146; *Josselyn v. Edwards*, 57 Ind. 212; *Hoffman v. Risk*, 58 Ind. 113; *Lowrey v. Byers*, 80 Ind. 443; *Pence v. Armstrong*, 95 Ind. 191; *Ellis v. Johnson*, 96 Ind. 377.

We find no error.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the costs of the appellants.

Filed Jan. 22, 1885.

No. 10,854.

COOPER v. JACKSON.

REAL ESTATE.—*Quieting Title*.—*Sale for Taxes*.—*Description*.—*Mistake*.—*Complaint*.—*Demurrer*.—Where, in a suit by the grantee in a tax deed to quiet his title to certain described land previously sold for delinquent taxes, the plaintiff avers, among other things, that such land had been by mistake entered upon the tax-duplicate by a description so indefinite and erroneous that the tax deed conveyed no title thereto, but that such

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description was intended to apply to and cover the land in suit, his complaint is sufficient on demurrer to entitle him, as such grantee, to the remedy against the land intended to be taxed and sold, provided in section 257 of the act of December 21st, 1872, for the assessment and collection of taxes, 1 R. S. 1876, p. 129.

SAME.—Partial Answer.—Merger.—Mortgage Debt.—A paragraph of answer, which is expressly limited to a specific part of the complaint, is not bad on demurrer merely because it fails to answer the whole complaint, nor is there any such merger of the debt secured by mortgage, in the decree foreclosing such mortgage, as will make it error to describe such debt as a mortgage debt, or as will invalidate an agreement to assume and pay the debt by that description.

SAME.—Sale for Taxes.—Purchase by Mortgagor or his Grantee.—Payment.—The mortgagor of land, or his grantee remaining in possession, owes a duty to the mortgagee to keep down the taxes, and if he, unmindful of his duty, allows the taxes to become delinquent, and directly or indirectly purchases the land for such taxes, such purchase operates only as a payment of such taxes, and the purchaser acquires no rights thereby as against the mortgagee.

PRACTICE.—Bad Answer.—Overruling Demurrer.—Harmless Error.—The overruling of a demurrer to a bad paragraph of answer is a harmless error, when the evidence is in the record and shows clearly and conclusively that the error did not affect the substantial rights of the plaintiff, and that notwithstanding such error "the merits of the cause have been fairly tried and determined in the court below."

From the Tippecanoe Circuit Court.

J. A. Stein, G. O. Behm, A. O. Behm and T. E. Johnson,
for appellant.

W. C. Wilson and J. H. Adams, for appellee.

Howk, J.—The appellant, Cooper, sued the appellee, Jackson, in a complaint of two paragraphs. The first paragraph was a complaint in ejectment, in the ordinary statutory form, for the recovery of certain real estate, particularly described, in Tippecanoe county. The second paragraph stated the appellant's title to the same real estate, under a tax sale and deed, and prayed for alternative relief, either that his title might be quieted, or that an account might be taken of the amount due him for taxes paid, etc., and the same declared to be and enforced as a lien on such real estate. The appellee's

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demurrer to the second paragraph of complaint, for the alleged want of sufficient facts therein, was sustained by the court below, but on appeal to this court this ruling was held to be erroneous, and the judgment thereon was reversed. *Cooper v. Jackson*, 71 Ind. 244. When the cause was remanded, in obedience to the mandate of this court, appellee's demurrer was overruled to the second paragraph of appellant's complaint.

On the former appeal it was substantially held that a complaint to quiet the title to lands purchased at a delinquent tax sale, wherein it is averred, among other things, that the lands therein described had been, by mistake, entered upon the tax-duplicate and sold by a description so indefinite as to convey no title thereto, but that such description was intended to apply to and cover the lands particularly described in the complaint, is sufficient on demurrer to entitle the holder of the tax deed under the tax sale to the remedy against the lands intended to be taxed and sold, provided in section 257 of the act of December 21st, 1872, for the assessment and collection of taxes. 1 R. S. 1876, p. 129. This holding has been approved and followed by this court in more recent cases: *Sloan v. Sewell*, 81 Ind. 180; *Ford v. Kolb*, 84 Ind. 198; *Reed v. Earhart*, 88 Ind. 159.

After the cause was remanded, appellee answered the second paragraph of appellant's complaint in three paragraphs, of which the first was a general denial, and each of the other paragraphs stated a special or affirmative defence. Appellant's demurrers to the second and third paragraphs of appellee's answer having been overruled by the court, he replied thereto by a general denial. The issues joined were tried by the court, and a finding was made for the appellee on the complaint, and, also, upon appellee's cross complaint which was filed before the former appeal. Over the appellant's motion for a new trial, a judgment and decree were rendered by the court upon and in accordance with its finding.

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Errors are assigned here by the appellant which call in question the decisions of the trial court in overruling his demurrers to the second and third paragraphs of answer to the second paragraph of his complaint, and in overruling his motion for a new trial. Before considering any of the questions arising under these alleged errors, we ought to say, perhaps, that prior to the former appeal herein the appellee sought by cross complaint to quiet his title to the land in controversy, as against the appellant, and that issue was joined upon such cross complaint by the appellant's answer in general denial.

In the second paragraph of appellee's answer, "to so much of the second paragraph of complaint as seeks a recovery of the amount which the plaintiff, in such paragraph, claims to have expended in the payment of taxes, interest and penalties," the appellee alleged that, on the 14th day of February, 1868, one Samuel Moore then the owner of the land in controversy, upon which the appellant was seeking to establish a lien, mortgaged such land to the appellee to secure the payment of a sum of money then owing by said Moore to appellee for purchase-money; that afterwards, on February 15th, 1870, the appellee brought suit in the common pleas court of Tippecanoe county to foreclose said mortgage, and such proceedings were thereafter had in that behalf, that, on April 1st, 1870, a judgment and decree for the foreclosure of said mortgage, and the sale of such land were duly rendered and entered; that afterwards, on February 7th, 1876, pursuant to a sale of such land by the sheriff of Tippecanoe county, under an order of sale issued on such judgment and decree, and on failure of redemption from such sale, the then sheriff of the county executed a deed of the land to the appellee, who thereupon went into possession of the land as owner thereof; that prior to the rendition of such judgment and decree, the said Samuel Moore sold and conveyed his equity of redemption in such land to one Zachariah T. Moore, but

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such conveyance was not recorded until long after the rendition of such judgment; that after the rendition of such judgment and decree, to wit, in 1870, said Zachariah T. Moore sold and conveyed such land, by warranty deed, to one John C. Shoemaker, who then and there entered into the possession of such land as owner thereof, and thereafter received the rents and profits thereof, until the appellee became the owner of the land as aforesaid; that, as part of the consideration for the conveyance of such land by said Moore to the said Shoemaker, the latter agreed to and with the said Moore to assume and pay off the appellee's aforesaid mortgage, and to assume and pay the taxes then unpaid and assessed against such land; that after the said Shoemaker had procured the conveyance to himself of the land, of which he was in the occupancy and in the receipt of its rents and profits, he neglected and omitted to pay the taxes assessed and due on the land, and suffered such taxes to become delinquent, and permitted the land to be sold by the county treasurer, on February 13th, 1874, for the then unpaid and delinquent taxes; that the said Shoemaker, for the fraudulent purpose of depriving the appellee of his mortgage security, then and there procured his agent, Christian M. Nisley, in charge of such land, to buy in the same at such tax sale and hold the certificate of such sale for his, Shoemaker's, benefit; that the said Nisley bought such land at the tax sale, and held the certificate thereof in no other or different capacity than as Shoemaker's agent, and that afterwards, and pursuant to such agreement between Nisley and Shoemaker, the said Nisley assigned and transferred the certificate of such tax sale to said Shoemaker, who afterwards assigned and transferred the same to the appellant. Wherefore, etc.

Of this paragraph of answer appellant's counsel say that it "only pretends to answer a *part* of the second paragraph of plaintiff's complaint, and is bad on that account, and for not being an answer to the *whole* of the complaint." This objection to the paragraph of answer is certainly novel, but it

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is hardly tenable, we think. Counsel cite no authorities in support of their position, and we know of none. We are familiar with the rule of pleading, under the code, which requires that a paragraph of answer must respond to so much of the complaint as it purports to answer, or it will be held bad on demurrer. *Smith v. Little*, 67 Ind. 549. But we know of no rule of pleading under which it can be held that a paragraph of answer, addressed and limited upon its face to a specific part of a complaint, is bad on demurrer merely because it is not an answer to the whole of the complaint.

It is further claimed by appellant's counsel that Shoemaker's agreement to assume and pay off appellee's mortgage on the land was invalid and inoperative, because, it is said, the second paragraph of answer showed that the mortgage had been theretofore merged in the judgment and decree of foreclosure. Counsel say: "There could have been no mortgage debt to pay off after the decree of foreclosure, for it was then merged in the judgment." We think, however, that the debt was none the less a mortgage debt, and might properly be described as such after as well as before the judgment and decree of foreclosure. In *Teal v. Hinchman*, 69 Ind. 379, it was held by this court that a mortgage is not so merged in a judgment of foreclosure as to defeat the lien of the mortgage. Surely, it can not be correctly said that the debt secured by a mortgage is so merged in the judgment and decree of foreclosure that it can no longer be described, accurately and appropriately, as a mortgage debt.

Appellant's counsel also insist that the allegations of the second paragraph of the answer do not show with sufficient clearness and certainty, that the taxes for which the land was sold and conveyed to the appellant, and which he is seeking to have declared a lien upon the land and to recover back in this suit, were either the taxes which Shoemaker had assumed and agreed to pay off, or the taxes which had been assessed against the land while Shoemaker was the owner and in possession of the land, and in receipt of the rents and profits

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thereof. It must be admitted, we think, that in these particulars there is some uncertainty in the allegations of the second paragraph of answer, but, as a general rule, uncertainty in pleading is no ground for demurrer, and can only be reached by a motion to make the pleading more certain and specific in the particulars of which complaint is made. It makes but little difference, however, in the case in hand, whether the paragraph of answer we are now considering is construed as charging that the taxes, for which the land was sold and conveyed to the appellant, were the taxes which Shoemaker had assumed and agreed to pay, or taxes which were assessed against the land after the same was conveyed by Moore to Shoemaker, and while he was its owner and in its possession, and in the receipt of the rents and profits thereof. It is very clear, we think, that the sale and conveyance of the land for taxes to Shoemaker would not, in either event, upon the facts stated in the second paragraph of answer, operate either to pass the title to the land or to create a lien thereon for the amount of taxes paid, interest, penalties and costs, or any part thereof, as against the appellee's prior mortgage lien for unpaid purchase-money.

In either event, it was incumbent on Shoemaker to pay off and discharge the taxes assessed against the land out of his own proper means. This was his duty, either under his contract of assumption or as owner of the equity of redemption, under his deed thereof from Zachariah T. Moore, to pay and satisfy such taxes; and he could not, in violation of such duty, by allowing such taxes to become delinquent, and by purchasing the land on account thereof, acquire a title to the land or a valid lien thereon, as against the mortgagee. In his excellent Treatise on the Law of Taxation, on p. 345, Judge Cooley says: "Some persons, from their relation to the land or to the tax, are precluded from becoming purchasers. The title to be transferred on such a sale is one based on the default of the person who owes to the government the duty to pay the tax. But one person may owe this duty to the government,

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and another may owe it to the owner of the land. Such a case may exist, where the land is occupied by a tenant, who, by his lease, has obligated himself to pay taxes. Where this is the relation of the parties to the land, it would cause a shock to the moral sense if the law were to permit this tenant to neglect his duty and cut off his lessor's title by buying in the land at a tax sale. So the mortgagor, remaining in possession of the land, owes it to the mortgagee to keep down the taxes; and the law would justly be chargeable with connivance at fraud and dishonesty, if a mortgagor might allow the taxes to become delinquent, and then discharge them by a purchase which would, at the same time, cut off his mortgage. There is a general principle applicable to such cases; that a purchase made by one whose duty it was to pay the taxes shall operate as payment only; he shall acquire no rights as against a third party, by a neglect of the duty which he owed to such party. This principle is universal, and is so entirely reasonable as scarcely to need the support of authority. Show the existence of the duty, and the disqualification is made out in every instance." The text of this learned author is fully sustained by a long list of decided cases in the courts of last resort in our sister States, to which we refer without reciting them.

We are of opinion that the allegations of the second paragraph of answer show, with sufficient certainty, that Shoemaker could not and did not by his purchase of the land in controversy, at the tax sale thereof, acquire any title to or lien upon such land, which he could enforce either at law or in equity as against the appellee. This being so, as it surely is, it seems clear to us that the appellant, under Shoemaker's assignment of his tax certificate of the sale of the land for taxes, made by his agent by his procurement and at his instance, and under the tax deed executed in pursuance of such assignment, acquired no other, different or better title to or lien upon the land than Shoemaker or his agent had thereto or thereon prior to such assignment. The assignee can take

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no more by the assignment of the certificate than the purchaser at the sale took by his purchase. *Hasselman v. Lowe*, 70 Ind. 414, p. 417; *Kruger v. Supervisors, etc.*, 44 Wis. 605.

Our conclusion is, therefore, that the court did not err in overruling appellant's demurrer to the second paragraph of appellee's answer.

Appellant's counsel also claim that the court erred in overruling the demurrer to the third paragraph of appellee's answer. We think this error is well assigned. If the opinion of this court, on the former appeal of this cause, in holding the second paragraph of appellee's complaint to be sufficient on demurrer, is good law, and certainly it is the law of this case, then the third paragraph of answer is hopelessly bad on demurrer, for practically the appellee sought to present, by his third paragraph of answer, the precise question which this court, on the former appeal, had decided against him. Indeed, appellee's counsel virtually concede, as we understand them, that if the former opinion of this court is adhered to, then the third paragraph of answer was bad, and the demurrer thereto ought to have been sustained.

Appellee's counsel earnestly insist, however, that the second paragraph of answer states his defence to this action, and that this defence was fully and completely sustained by the evidence appearing in the record. In this view of the case we concur with appellee's counsel. We think that the error of the court, in overruling the demurrer to the third paragraph of answer, did not affect the substantial rights of the appellant, and "that the merits of the cause have been fairly tried and determined in the court below." In such a case, and for such an error, the statute forbids that the judgment be "reversed in whole or in part." Sections 398 and 658, R. S. 1881.

The judgment is affirmed, with costs.

Filed Jan. 20, 1885.

 Langsdale v. Woollen, Administrator.

No. 9474.

LANGSDALE v. WOOLLEN, ADMINISTRATOR.

99	575
149	461
99	575
164	380

TRUST AND TRUSTEE.—*Fraudulent Conveyance.*—*Agreement.*—*Statute of Frauds.*

—*Statute of Limitations.*—*Demand.*—*Presumption.*—Where one holds lands in secret trust for another, to defraud creditors, and by subsequent parol agreement the land is converted into money to be used by the trustee in paying the creditors, the balance to be put at interest until called for or until the grantor's youngest child reaches full age, the new agreement purges the original fraud, is valid though not in writing, the statute of limitations does not begin to run until demand by the *cestui que trust* or full age of the youngest child, and the lapse of twenty years raises no presumption of payment.

HARMLESS ERROR.—*Pleading.*—Error in sustaining a demurrer to a paragraph of answer to one of several paragraphs of complaint is harmless, if the same issue was made upon another paragraph of the complaint, and upon trial was found against the defendant.

SAME.—It is harmless error to sustain a demurrer to a paragraph of answer, all the averments of which are provable under another issue made by the pleadings.

DECEDENTS' ESTATES.—*Appointment of Administrator.*—That a prior administrator has been discharged because he could find no assets does not prevent the appointment of an administrator *de bonis non*; nor is the fact that proceedings are pending for the removal of the latter a reason for abatement or stay of proceedings of a suit instituted by him.

SAME.—*Collection of Debts.*—Where there is no widow, and no debts against an estate, the heirs may collect debts due the estate without an administrator, but this can not prevent the appointment of an administrator.

EVIDENCE.—*Lost Writing.*—*Immateriality.*—Where a writing, which would be proper evidence, is shown to be lost, parol proof of its contents is admissible, and if the evidence be immaterial it is necessarily harmless.

PRACTICE.—*Rule of Court, Enforcement of.*—Where a rule of court forbidding the removal of papers from the files has been violated by an attorney in the cause, as to depositions, the court may strike out his motion to suppress parts thereof.

SAME.—*Amendment of Pleading.*—*Discretion.*—The trial court has much discretion in the matter of amending pleadings, and this is not abused by refusing an immaterial amendment.

SAME.—*Interrogatories to Jury.*—In a suit by an administrator to recover money held in trust, it is immaterial whether there are demands against the estate or not, and interrogatories upon the subject should not be sent to the jury.

From the Hancock Circuit Court.

Langsdale v. Woollen, Administrator.

A. C. Ayres, E. A. Brown, J. A. New and J. W. Jones, for appellant.

W. W. Woollen, for appellee.

FRANKLIN, C.—Appellee, as administrator of the estate of John Crowder, sued appellant for money held by him in trust for the use of said estate.

The complaint contains a long history of transactions, commencing as far back as 1838, which we can not see affect the merits of the real matters in controversy. The complaint contains three paragraphs, which are substantially the same, and the parties have called our attention to the third one. After, as we think, the unimportant previous history, this paragraph alleges that in 1854 the defendant, as trustee, for the use of the deceased, held the legal title, and the deceased the equitable title, to certain real estate, and that they by agreement sold the same for \$4,000; that \$1,500 was paid in cash, which was received by deceased, and notes were taken for the balance in deferred payments; that deceased then sold all his personal property, and notes were taken for the same; that deceased was an illiterate colored man and had full confidence in the defendant, and, by agreement of said parties, all of said notes for both real and personal property were to be left with said defendant for collection, and to facilitate the same the notes were all executed to the defendant, and left with him for that purpose, under the further agreement that the defendant should collect, pay deceased's debts, and keep the balance of the same at interest until deceased called for the money, and if it should not be called for during the life of deceased, the defendant should keep it at interest until deceased's children all came of age; that deceased then moved to Canada; that deceased died in Canada without calling for the balance of said money; that all of said deceased's children were of age, the youngest being twenty-six years old before the commencement of this suit; and that the plaintiff had demanded the money, which the defendant

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refused to pay. Demurrers were overruled to each paragraph of the complaint.

The first objection to the complaint is that it shows an arrangement to defraud the creditors of deceased. We do not see any reasonable grounds for such objection, and do not think appellant occupies any favorable position in making such objection. There is nothing showing that deceased had any creditors not provided for by the arrangement, and if they were not all fully paid, it was the fault of the defendant and not of the deceased.

The second objection is that it shows the defendant's compliance with a former contract and the deceased's non-compliance therewith. The former contract was cancelled and set aside by the subsequent agreement and the execution of the conveyance by both the parties in pursuance of the sale of the real estate. The defendant can not go back and insist upon the former contract.

The third objection is, that the complaint shows that the last agreement was made without any consideration, that the legal title was then in defendant, and the proceeds of the sale belonged to him; that after the deceased had received the \$1,500 cash payment, the defendant's promise to collect the deferred payments and pay them to the deceased was without consideration.

The complaint shows that the defendant had paid \$200 of encumbrance upon the land, and that he held the legal title to secure the repayment thereof, and that his title-deed was in fact only a mortgage. When the land was sold and conveyed by both defendant and deceased, the proceeds, after the payment to the defendant of said \$200 and interest, belonged to the deceased, and was a sufficient consideration for the promise of defendant to pay the same to him when called for, or when his youngest child came of age.

The fourth objection is that the alleged contract shows an attempted express trust, which can only be created by being

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reduced to writing. The deceased was arranging his affairs so as to move to Canada for the purpose of residing there, and he selected his intimate friend (the defendant) as his agent to settle up his affairs, as is shown by the complaint. We think the agreement was binding without being reduced to writing.

The last objection is that the complaint shows that twenty years had elapsed from the date of the contract before any demand was made; and the law presumes the liability paid when the parties are not in ignorance of their rights. According to the terms of the contract, no action could accrue upon it until there was a call for the money by the deceased, or until all his children had arrived at age. No call was ever made, and the youngest child did not arrive at the age of twenty-one years until within five years before the demand for the money and the commencement of this suit. The law raises no presumption of payment under such circumstances.

We have thus decided these objections to the complaint without any lengthy discussion of either of them, believing that the reasons therefor will obviously appear. To the third paragraph of the complaint the defendant filed an answer, the first paragraph of which is in substance as follows: That deceased died in Canada in August, 1854, and that an administrator on his estate was there appointed. And on the 28th day of September, 1855, one George W. Mears, in the county of Marion and State of Indiana, was appointed by the probate court of said county as administrator of the estate of said deceased; that he continued to act as such until the — day of ———, 1858, when he resigned, and Alexander Graydon was then appointed as his successor, who continued to act as such administrator until the 13th day of March, 1863, when he reported to the proper court that he could find no property upon which to administer, and asked to be discharged. The court then discharged him and discontinued the estate in court. (This historical part of the administra-

tion, like that of the action of the parties contained in the complaint, we do not see wherein they can affect the merits of the matters in controversy between the parties.)

The answer then proceeds: That on the 27th day of March, 1874, the plaintiff was appointed by the Marion Circuit Court administrator of said estate upon his own application, and that at said time said deceased had no estate in said county to be administered; that said deceased did not die in said county, nor the State of Indiana, nor in the United States, and that said court had no power, or authority, or jurisdiction to appoint him as such administrator; that since the institution of this suit the defendant had filed in the Marion Circuit Court a petition and application to have said plaintiff's letters annulled and set aside for the facts in this paragraph alleged, and the same is still pending in said court, and asks that this suit be abated permanently, and, if not, temporarily, until said petition in said court is decided.

This paragraph of answer was verified by the defendant, and filed in October, 1880. A demurrer was sustained to it.

In connection with the plea in abatement the following additional paragraphs of answer were filed:

2d. The general denial.

3d. Payment.

4th. Six years' statute of limitations.

5th. Fifteen years' statute of limitations.

6th. Special plea of payment.

7th. General accounting and set-off.

Similar paragraphs of answer, except the plea in abatement, were filed to the other paragraphs of complaint, with an additional paragraph of special denial of a letter alleged to have been written by the defendant to the widow of deceased, after deceased's death, admitting that he had collected the money, and promising to invest it for the use of her and the children. Demurrers were sustained to the third, twelfth, thirteenth and fourteenth of these answers to the first and second paragraphs of the complaint.

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The paragraphs of answer are substantially duplicates to each paragraph of complaint. And as to those to which the demurrer was sustained, the third alleged an accounting and settlement; the twelfth, a denial of the letter as above stated; the thirteenth, special denials of the historical part of the complaint before referred to; the fourteenth, the alleged agreement was not in writing.

The rulings upon these last named demurrers are first considered by appellant in his brief. It is insisted that as to the said third paragraph it is good, and the evidence of an accounting and settlement could not be given in evidence under the paragraph of payment. This may be true. But there was a paragraph of answer to the third paragraph of the complaint of a similar purport on an accounting and settlement and for set-off, under which could have been given in evidence all the facts that could have been given under this paragraph. And it is admitted by appellant in his brief that the third paragraph of the complaint contained all the material facts of the first and second, though more specifically pleaded. Therefore, appellant at the trial could not have been injured by this ruling.

The special denials contained in the twelfth and thirteenth paragraphs were embraced in the general denial which was in the answer, and appellant was not injured by this ruling. The fourteenth, that the agreement was not in writing, was not sufficient to constitute a defence.

Appellant, in his brief, discusses at length the sustaining of the demurrer to the plea in abatement, and insists that when the estate had been finally settled by the administrator, Graydon, in 1863, and he was by the court discharged, no administrator on that estate could afterwards be appointed. The paragraph of answer shows that the former administrator was discharged without any administration of the estate; that no assets had ever come into his hands, and upon his discharge the estate was discontinued in court, and then stood

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the same as though no administrator had ever been appointed upon the estate, nothing whatever having been done in the estate by any administrator.

As to the allegations in the answer, that the deceased died in Canada, and had no assets in Marion county to be administered, the application for the appointment of appellee as administrator stated sufficient facts to give the court jurisdiction to make such appointment, and appellant can not in this collateral way attack the truth of the statements in said application. This suit was for the purpose of determining whether there were any assets in the county to be administered. And appellant can not thus get rid of the investigation, but should be held to answer as to the merits of the claim. But appellant insists that if he can not thus collaterally attack the appointment of the administrator, the court ought to have enjoined and restrained the further prosecution of this suit until his petition pending to have the letters revoked could be heard and determined. This plea in abatement does not show that said estate had ever been administered upon and finally settled.

There was no error in the court's sustaining the demurrer to the plea in abatement, or in refusing to stay the proceedings. Under the motion for a new trial, various reasons are stated. We will confine ourselves to those insisted upon by appellant in his brief, considering all others as being waived. The second instruction given to the jury is first complained of. That instruction reads as follows:

"The plaintiff, in opening his case, read to you the third paragraph of his complaint only, and stated to you that he relied for his verdict upon the facts alleged in this third paragraph. I will not, therefore, trouble you by calling your attention to the other paragraphs of the complaint.

"The plaintiff's cause of action, as charged in the third paragraph of his complaint, may be stated in a few words. It is that certain notes executed by Garner & Franco to the de-

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defendant Langsdale were, in fact, the property of the decedent John Crowder; that the defendant Langsdale agreed with said Crowder that he, said Langsdale, would collect said notes for said Crowder and pay out of the proceeds the debts of Crowder, and keep the residue until Crowder called for it, and that if Crowder did not call for it in his lifetime, the said defendant should put the money at interest, and the control thereof should be kept by said defendant until said Crowder's children should become of age; that in pursuance of said contract the defendant did collect said notes; that soon after said contract was made said Crowder died, never having called upon Langsdale for said money; that the children of said Crowder have all arrived at twenty-one years of age, and that the plaintiff, as the administrator of said Crowder, has, before the bringing of this suit, demanded of said defendant that he pay over said money to him, and that the defendant has refused to do so."

The objection to this instruction is that it does not state all the material allegations of the third paragraph of the complaint. We think the long history of various transactions, extending from 1838 to 1854, between Crowder and others about their holding the title to his real estate, whether in trust for himself and family and a part of his creditors, or in fraud of his creditors, makes no difference in this controversy. Even if Langsdale got the title to the lands in either way, having paid \$200 encumbrance thereon, he and Crowder, being the parties then interested, had a right to unite in the sale of the lands, and adjust the equities between themselves, providing for the payment of Crowder's debts out of the proceeds of the land, and agreeing that what was left after the defendant was made whole for what he had paid out should be held for the use of Crowder or his children, such transaction would fully supersede any fraudulent conveyance for said lands that may have theretofore been made by said Crowder. In *Bump on Fraudulent Conveyance*, 3d ed., page

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452, it is said: "If the parties voluntarily rescind the fraudulent conveyance, a subsequent arrangement between them in regard to the same property will not be tainted by the previous fraud." See, also, the case of *Parker v. Tiffany*, 52 Ill. 286.

In the case of *Matthews v. Buck*, 43 Maine, 265, the following language is used: "No reason is perceived why parties who have made a contract in fraud of the rights of creditors, should not be permitted subsequently to rescind such contract in all cases before the rights of attaching creditors or subsequent purchasers have intervened, and where such existing rights are not affected thereby. A rule of law which should prevent them from doing so would be manifestly unjust, and tend greatly to the perpetuation of such frauds. Notwithstanding such a contract is valid between the parties, still if they voluntarily rescind it, no disability will attach, by reason of any previous fraud, to any subsequent arrangement of theirs in regard to the same property, so as to render it invalid, whether such arrangement be made with other persons or between themselves, provided the rights of third parties had not then attached."

The real ownership of the notes in the case under consideration depended upon whether such subsequent agreement was made, and not whether there had previously been a fraudulent conveyance of the lands; therefore these previous historical averments were immaterial in the real controversy, and we think the court gave to the jury a very plain and succinct statement of the substance of the real matter in controversy between the parties. We do not see that appellant has any just cause to complain of this instruction.

The fourth instruction is also objected to, which reads, substantially, as follows:

That it makes no difference whether the original arrangement between Crowder and Langsdale, in relation to putting the title to the land in Langsdale's name for the use of

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Crowder, was in fraud of Crowder's creditors or not; if the parties afterwards made the agreement as set forth in the complaint, there was a valid consideration for the agreement, and the agreement was binding upon the parties.

According to the authorities heretofore cited, the subsequent agreement cancelled any fraud that may have existed in the original arrangement, and as provision was made in the subsequent agreement for the payment of all of Crowder's debts, there was no error in this instruction.

The sixth instruction is also objected to, which substantially states as follows:

If a former administrator made a demand upon the defendant for the money in suit, but such demand was made before Crowder's children became of age, the defendant, under the contract claimed by plaintiff, was under no obligation to comply with such demand, and no cause of action could thereby arise to Crowder's estate, and the statute of limitations would not then begin to run by reason of such demand.

Without discussing this instruction, we see no reasonable objection to it, and find no error in it.

Counter instructions to those given were asked and refused, and as we hold there was no error in those given, we necessarily hold that there was no error in refusing the ones asked.

The fifth reason for a new trial is that the verdict is contrary to law, and that is based upon the claim that the evidence shows that the original transaction of Crowder in putting the title to his lands out of his name was to defraud his creditors.

We have heretofore decided that whether the evidence shows that or not, makes no difference; if it did, that would not invalidate the subsequent sale of the land by both the parties, and the agreement in relation to the notes; hence the verdict was not contrary to law.

The ninth reason for a new trial is the overruling of appellant's motion to strike out parts of the deposition of Celia

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J. Hart, the widow of deceased, John Crowder. She testified in her deposition that in a short time after her husband's death she wrote a letter to the defendant Joshua M. W. Langsdale, and signed her name to it, informing him that her husband was dead, and asking him to send to her some money, but he did not do it; the money she asked for was what he had collected on notes given for balance on land. She then stamped the letter and placed it in the post-office, to be sent to him by mail. She kept a copy of the letter, but it got misplaced and lost; she had looked for it but could not find it; that in a short time she received a letter in answer from the defendant Mr. Langsdale, and it also got lost in Canada. She had searched for and could not find it; she had also got a lawyer to come to her house, and look through all her papers for it, but he could not find it.

In answer to her letter, he wrote to her that he had got the money, but he would not send to her there. He said, if she would come back he would appropriate that money for her benefit and the children,—if she would come back to Indianapolis. She had written to Mr. Langsdale that her husband had bought a house and lot and owed some on it, and unless she got the money she would lose the property. In his answer he said, let it go and come there, and he would buy her one.

The objection to this evidence in the deposition was that it was immaterial. If it was only immaterial, it could not materially harm appellant. But we think it was material, and brought within the rule permitting oral testimony to be given of the contents of lost instruments. There was no error in refusing to strike out this part of the deposition. Other unimportant objections are made to other parts of the deposition, which we think unnecessary to set out in this opinion.

Appellant further complains, under other reasons for a new trial, that the court erred in striking from the files of the

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case other motions for the suppression of parts of other depositions. There was a rule of record of the court, that after a cause was at issue, no party or attorney should take any of the papers in the case from the court-room or clerk's office, and appellant's counsel, in violation of said rule, had taken said other depositions, after the cause had been put at issue, to their law-office, distant from the court-room and clerk's office, and kept the same there until after the cause was called for trial. The rule was not in violation of any statute, and the court had the right to enforce such rule. We see no abuse of the discretion of the court in resorting to the remedy it did for the enforcement of its rules.

In the twenty-second reason for a new trial appellant complains of the court for refusing to admit in evidence a certain transcript of a former case in the circuit court of Marion county, Indiana, of one Mears, administrator, against appellant. The purpose announced by appellant, for which the same was asked to be given in evidence, was to prove a previous demand for the money sued for, so as to then cause the statute of limitation to commence running. That was before the youngest child came of age, and no demand, if proved then to have been made, would cause the statute of limitations to begin to run against the claim herein sued upon. There was no error in excluding this evidence for that purpose.

The twenty-fourth reason for a new trial is based upon the ruling of the court in refusing to allow appellant leave to file an additional paragraph of answer. Appellant had on file before that time seven paragraphs of answer. A demurrer had been sustained to the first, and overruled as to the others. Appellant, at the time he asked for such leave, stated to the court that the additional paragraph he desired to file would be the same as the first to which the demurrer had been sustained, with the additional averments, "that no claims were filed against the estate of John Crowder, of whom said Woollen is administrator; that there were no claims pending

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at the time of said Woollen's appointment, and that said estate had therefore been fully administered upon."

Appellant certainly had a full opportunity to answer when he filed seven paragraphs of answer. He had in the record the benefit of the question contained in the first paragraph by a demurrer being sustained to it, and we think the additional averments proposed would add nothing to the strength of the first paragraph. The court necessarily possesses discretionary powers in allowing additional pleadings to be filed, and in this case we do not see any abuse of such discretion. There was no error in refusing to allow such additional paragraph of answer to be filed. But this question should have been presented in the assignment of errors instead of in the motion for a new trial.

The twenty-fifth reason for a new trial is the last one insisted upon by appellant, and that is, that the court erred in refusing to submit to the jury the following interrogatories:

"1st. Has the plaintiff in this action shown any indebtedness of the estate of John Crowder, if so, to whom is said estate at this time indebted, and amount of such indebtedness?"

"2d. What creditors of said Crowder, if any, ever filed or proved their claim against the estate of John Crowder?"

These interrogatories were not applicable to any of the material issues in the case. This action was not for the purpose of paying debts against the estate, but for the purpose of collecting a debt coming to the estate. Where there is no widow, and no debts against the estate, the heirs could collect debts coming to such estate without an administrator, but even that remedy does not prevent the appointment of an administrator for the purpose of collecting the debts coming to the estate. *Salter v. Salter*, 98 Ind. 522. And for reasons heretofore stated there was no error in refusing to submit these interrogatories to the jury.

We find no error in this record. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing

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opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

ELLIOTT, J., did not participate in this decision.

Filed Jan. 22, 1885.

No. 11,088.

FORBING ET AL. v. WEBER.

WILLS.—*Revocation.*—*Destruction.*—*Insanity.*—The destruction of a will by the maker during a temporary fit of insanity is not an act done with his consent, and does not revoke it, nor, under the statute, R. S. 1881, section 2609, prevent its proof and establishment as one destroyed.

SAME.—*Probatng Will.*—*Evidence.*—*Copy.*—In proceedings to prove and establish a will destroyed, proof that the testator caused it to be recorded in the recorder's office, and that the record there found is a correct copy of the original, with evidence given by the attesting witnesses that the original was duly executed, is sufficient to show that the copy as recorded is a true copy, and it is then admissible in evidence.

PRACTICE.—*Competency of Witness.*—*Evidence.*—*Harmless Error.*—If a witness be competent as to any matter in issue, there is no available error in overruling a general objection "that he is incompetent," and in any event, if he testify only to matters which are established by other evidence without conflict, the error, if any, is harmless.

From the Adams Circuit Court.

D. Studabaker, C. M. France, — Merryman and W. J. Vesey, for appellants.

B. Harrison, W. H. H. Miller and J. B. Elam, for appellee.

ELLIOTT, J.—The complaint of the appellee prays that a will alleged to have been executed by John Tomellier, deceased, and afterwards lost or destroyed, may be admitted to probate.

It is argued that the complaint is bad for the reason that it is not averred that the will was not destroyed for the purpose of revoking it, but, we think, facts are averred which authorize the conclusion of law that it was not revoked. In one

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place it is alleged that the will was destroyed by the testator while he was in a state of temporary insanity, and not of sound mind, and that when he recovered from the fit of temporary insanity, he declared that he had no intention of revoking the will. It is also averred that the testator caused the will to be recorded in the records of the county for the purpose of preserving it, and that he made no subsequent will, but died testate. These facts rebut the presumption that the will was burned for the purpose of working a revocation, and also show that there was no revocation by a subsequent will. As the testator knew that the public records of the county contained an accurate copy of the instrument, it is but reasonable to infer that when he regained his mental capacity he acted upon the presumption that it was not necessary to cause the will to be rewritten. Of course, the recording of the will added nothing to its effect, but, while this is true, it is also true that it preserved an accurate copy, and enabled the original to be reproduced without doubt or uncertainty.

To constitute a valid revocation of a will, two things must concur: 1. The intention to revoke; 2. The act manifesting the intention. *Woodfill v. Patton*, 76 Ind. 575; *Runkle v. Gates*, 11 Ind. 95; *Woolery v. Woolery*, 48 Ind. 523; *Wright v. Wright*, 5 Ind. 389; 1 *Jarman Wills* (5 Am. ed.) 284. A testator who destroys a will in a fit of temporary insanity does not revoke it, for the plain reason that in legal contemplation an insane man can neither form nor manifest an intention; the intention which the law regards is that of a reasoning being, not that of a person bereft of mental power. The authorities all agree that a revocation is not effectual unless executed in the manner required by law, and it is not possible for a man destitute of reason to execute a revocation in that manner, because he is incapable of forming the intention which the law declares is indispensably necessary to the existence of a valid revocation.

We do not deem it necessary to discuss the question as to

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the sufficiency of the third paragraph of the answer, for, assuming it to be good, no available error was committed in sustaining the demurrer, because the general denial entitled the appellants to introduce all the evidence that would have been competent under that paragraph.

It has been held in many cases that objections to the competency of evidence must be specifically stated to the trial court and embodied in the bill of exceptions. *City of Delphi v. Lowery*, 74 Ind. 520, and authorities cited. It has also been uniformly held that it is not sufficient to state in general terms that evidence is not competent, but that the particulars in which the evidence is alleged to be incompetent must be pointed out with a fair degree of certainty. *Harvey v. Huston*, 94 Ind. 527; *Lake Erie, etc., R. W. Co. v. Parker*, 94 Ind. 91; *Fitzpatrick v. Papa*, 89 Ind. 17; *Cox v. Stout*, 85 Ind. 422; *McClellan v. Bond*, 92 Ind. 424; *Underwood v. Linton*, 54 Ind. 468; *Stanley v. Sutherland*, 54 Ind. 339; *Murray v. Phillips*, 59 Ind. 56; *Manning v. Gasharie*, 27 Ind. 399. The reason which supports the rule, which the cases cited so firmly establish, applies with peculiar force to a case where, like this, the witness is only partially incompetent. If it were conceded that Weber was an incompetent witness as to matters which took place before the testator's death, he was still not altogether an incompetent witness, for he was competent as to matters which occurred after the death of the testator. It seems clear, therefore, that a general statement, made when the witness is offered in such a case as this, that he is not competent, is not sufficiently specific; and that the objection should be specifically made when questions calling for testimony as to matters which occurred prior to the ancestor's death are propounded. Tried by this rule, the objection made below is not such as will present any question for our decision.

But if we are wrong in the conclusion just stated, a reversal can not be adjudged. This we say, because Weber's

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testimony was addressed to a point upon which there was no dispute, and the finding must have been the same upon that point had his testimony been excluded. *Aufdencamp v. Smith*, 96 Ind. 328; *Terre Haute, etc., R. R. Co. v. Pierce*, 95 Ind. 496; *Rhoads v. Jones*, 92 Ind. 328; *Citizens Bank v. Adams*, 91 Ind. 280, see p. 288; *Bush v. Seaton*, 4 Ind. 522; *Manchester v. Doddridge*, 3 Ind. 360; *Parker v. State*, 8 Blackf. 292.

The statute provides that no will shall be established as lost or destroyed "unless the same shall be proven to have been in existence at the time of the death of the testator; or be shown to have been destroyed in the lifetime of the testator without his consent, or otherwise fraudulently disposed of; nor unless the provisions shall be clearly proven by two witnesses, or by a correct copy and the testimony of one witness." In our opinion, the evidence shows that in legal contemplation, and within the meaning of the statute, the will was destroyed without the testator's consent. It is shown by the testimony of several witnesses, that it was destroyed, with other papers, when the testator was acting wildly, threatening to kill his son-in-law, and while he was engaged in other acts of violence. These witnesses, having stated the facts, declared that in their opinion he was of unsound mind at the time the will was destroyed. If this be true, it follows that he was not legally capable of consenting to any act. An insane man can not be said to consent to anything in the nature of the revocation of a will, for, as we have seen, there can be no revocation unless there is present the intention to revoke, and where there is no mental capacity, there can be no intention within the meaning of the law.

The record contains a copy of the will, and several witnesses testified that the will was executed in the office of the recorder, and two, at least, testified that the testator deposited it there for record. The persons who attested the will as subscribing witnesses testified as to its execution, and others testified that the testator told them that he had left it at the

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recorder's office to be recorded. We think that the copy found of record was such as complies with the requirements of the statute. It is immaterial for what purpose the copy was made, for, if the copy is an accurate one, it is sufficient under the statute. When it is shown, as it was here, that the will was executed and deposited for record, and that it was copied in one of the books of record, and this record was read, there was evidence as to its contents independent of the copy itself. This evidence came from more than one witness; it came from the deputy recorder who copied the will into the record, from the witness who went with the testator to the recorder's office, from the witness who testified that the copy was a true one, from the witnesses who testified that the testator told them that the will had been deposited by him for record, and from the witnesses who testified that the original was taken, by the testator from the office of the recorder after it had been recorded. Where a copy is shown to be a true one by the testimony of one witness, and where it is shown to have been copied by the person with whom it was deposited by the testator and by his direction, we do not believe it necessary to prove the exact contents by any other witness, but that it is sufficient if some other witness states in general terms the provisions of the instrument. In the present instance this was done by the witness John Weber.

The record of the will was not competent evidence as a record, for the will was not entitled to go upon record, but it was competent for the purpose of exhibiting a copy of the instrument. It did not have the force of a record, but it did exhibit a copy of the will, and, when proper supplementary testimony was given by the person who made the copy, the instrument as copied was properly read in evidence.

Judgment affirmed.

Filed Jan. 22, 1885.

Hunt v. The New York, Chicago and St. Louis Railway Company.

No. 11,156.

HUNT v. THE NEW YORK, CHICAGO AND ST. LOUIS RAILWAY COMPANY.

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RAILROADS.—*Appropriation of Land.*—*Description.*—*Amendment.*—Under section 3909, R. S. 1881, the court has power, during the pendency of a proceeding by a railroad company to condemn land for the right of way of its road, to permit the plaintiff to amend the description of the land so condemned, as set forth in the article of appropriation and in the proceedings thereunder.

SAME.—*Supreme Court.*—*Presumption.*—*Damages.*—In such case the Supreme Court will presume, in the absence of the evidence adduced at the trial, that if the quantity of land appropriated was augmented, or the damages of the owner increased, by reason of such amendment, these facts were considered by the jury in making their assessment.

From the Lake Circuit Court.

T. J. Merrifield, for appellant.

W. B. Johnston and J. B. Cohrs, for appellee.

COLERICK, C.—This was a proceeding by the appellee to condemn, as a right of way for its railroad, a strip of land owned by the appellant. During the pendency of the proceeding, the appellee was permitted by the court to alter and amend the description of the land so condemned as set forth in the article of appropriation that was filed by the appellee, and in the proceedings thereunder. The action of the court in permitting the amendment to be made is the only error assigned. The record shows that leave to so amend was granted by the court on the written application of the appellee, in which it was stated "that in the proceedings heretofore had in the instrument of appropriation and proceedings to condemn, an error, through inadvertence, was made in the description of the lands to be appropriated by it (the appellee) over and across the defendant's premises in Porter county, Indiana, in this, to wit, that the starting point in said premises is given as commencing 485 feet north of the southeast corner of the west half of the southwest quarter of section twenty-three (23) in township thirty-five (35) north, range

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six (6) west, when the true starting point was, is, and should have been given, as 1,463 feet south of said southeast corner; that by commencing at the point of termination, as given, on the west side of said tract, in the instrument of appropriation and proceedings to condemn, and following the courses and distances back to the east line of said tract, it brings out the starting point as 1,463 feet north of said southeast corner of said tract, and where the line of the railroad was located and distinctly marked out at the time of the appropriation, and condemning the same, and where the same was actually viewed and appraised by the appraisers appointed by the court on petition of plaintiff to assess the damages to defendant by reason of the appropriation therein. And the plaintiff further says that, at the time of the assessing of the damages to defendant, as aforesaid, said defendant and his attorney were along with the appraisers and passed over this identical line with them, and pointed out the same to the appraisers; and the plaintiff further says that its railroad has been constructed and is in operation on the identical line as appraised and pointed out to the appraisers as aforesaid," etc.

The truth of the facts recited in the application, as above set forth, was verified by the affidavits of Mr. Johnston, the attorney for the appellee, and Mr. Garber, its civil engineer, who surveyed and located the line across the land in question, which affidavits were filed with and in support of the application. No counter affidavits were filed by the appellant, nor were the facts recited in the application controverted in any manner by him. It is fair to infer that they were true. After the amendment was made, a trial by jury occurred, resulting in the rendition of a verdict in favor of the appellant, by which his damages, caused by said appropriation, were assessed at \$3,000, for which sum judgment was rendered in his favor. These damages were assessed after the amendment was made. So, if the quantity of land appropriated by the appellee was augmented, or the damages of the appellant were increased, in consequence of the amend-

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ment, it is safe to presume that those facts were considered by the jury in the assessment of the damages. It is proper for us to presume so in the absence of the evidence adduced at the trial.

The statute relating to the subject of appropriation of lands by railroads, provides: * * * "The court shall also have power, at any time, to amend any defect or informality in any of the special proceedings authorized by this act as may be necessary." * * * R. S. 1881, section 3909. It has been held by this court, in *Prather v. Jeffersonville, etc., R. R. Co.*, 52 Ind. 16, that statutes authorizing the taking of private property for public use are not to be extended by inference, nor are they to be so strictly or literally construed as to defeat the evident purpose of the Legislature. Under the provision of the statute above cited, we think the court below possessed ample power to permit the amendment to be made. It is quite apparent that the court in the exercise of its power, so conferred, did no injustice to the appellant, as the amendment was allowed and made while the proceeding was *in fieri*, and before the damages finally awarded were assessed.

PER CURIAM.—The judgment of the court below is affirmed, at the costs of the appellant.

Filed Jan. 22, 1885.

No. 11,926.

OVERTON v. ROGERS.

JUDGMENT.—*Application to Set Aside.*—*Complaint.*—*Defects Cured.*—In the absence of a demurrer or a motion to make more specific, a complaint to set aside a judgment rendered by default, which fails to allege the date thereof any more definitely than that it was "on the — of —, 1882," will be deemed cured after a finding.

SAME.—*Fraud.*—*Former Adjudication.*—*Negligence.*—An adjudication of a motion to set aside a judgment rendered by default, on the ground of excusable neglect, is not a bar to a subsequent action to set aside such judgment for fraud, even if the plaintiff had knowledge of the fraud when his motion was made.

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SAME.—Variance.—Where a complaint to set aside a judgment alleges a judgment by default for three thousand dollars, and the proof shows it to be three thousand five hundred dollars, the variance is not material.

WITNESS.—Impeachment.—The impeachment of the character of a witness is only one of the modes of testing his credibility, and the court or jury may believe such witness notwithstanding his impeachment.

From the Washington Circuit Court.

J. A. Zaring and A. B. Collins, for appellant.

D. M. Alsbaugh and J. C. Lawler, for appellee.

BICKNELL, C. C.—The appellee moved to set aside a judgment taken against him by default in said court in favor of the appellant at the August term, 1882.

His affidavit in support of said motion was met by a counter affidavit, and the motion was overruled. He appealed to this court, where the judgment of the court below was affirmed. *Rogers v. Overton*, 87 Ind. 410. The ground of the motion was alleged excusable neglect of the appellee. R. S. 1881, section 396.

The judgment had been taken by default on a failure to appear, and was for upwards of \$3,000. Afterwards the appellee filed his complaint in the present suit to set aside said judgment for fraud. The complaint alleged that the appellant's attorneys, for the purpose of preventing the appearance of the appellee in the original suit, had notified him a few days after the service of the summons, and before the day of appearance, that he need not appear and defend in said suit, that he would not be wanted, for the reason that said suit had been settled, and that the complaint would be withdrawn and said suit dismissed. The complaint also stated that a few days after said notification, the appellant, in person, told the appellee that he did not intend to further prosecute said suit against him, and would have nothing further to do with any prosecution thereof against him; that the appellee relied on said notification and representation, and fully believed that said suit had been settled and would be dismissed and said

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complaint withdrawn, and, therefore, did not attend said court nor appear in said suit, but the plaintiff and his said attorneys took advantage of his absence, so induced and caused by them, and took judgment against him by default for the sum aforesaid; that one of said attorneys afterwards admitted that said notice had been sent as aforesaid for the purpose of deceiving the appellee and keeping him away from said court, so that said judgment might be obtained against him. The complaint also stated the appellee's defence to said original suit, and prayed that the judgment might be set aside for the fraud aforesaid, and that the appellee might be permitted to file his answer in said original suit.

The appellant filed an answer to said complaint, setting up the proceedings upon the motion to set aside the default, and alleging them in bar of the complaint, as a former adjudication of the matters therein stated. A demurrer to this answer was overruled, and the appellee replied to said answer by a general denial.

The appellant afterwards, by leave of court, filed a general denial of said complaint.

The issues were tried by the court, who found for the appellee, overruled a motion by the appellant for a new trial, and rendered a judgment vacating the aforesaid judgment against the appellee and giving him leave to file an answer in the original suit. From this judgment the present appeal was taken. The errors assigned are:

1. The complaint does not state facts sufficient, etc.
2. Overruling the appellant's motion for a new trial.

The only objection made to the complaint is, that it fails to state on what day the judgment by default was rendered. The complaint states that the judgment was rendered on the — day of —, 1882. To plead with such blanks is discreditable, but there was no demurrer to the complaint, and no motion to make it more specific, and the defect must be regarded as unavailable after a finding.

Overton v. Rogers.

The reasons for a new trial are that the finding is not sustained by sufficient evidence and is contrary to law.

The appellant claims that the finding is not sustained by the evidence, because the complaint alleges a judgment by default for \$3,000, and the judgment proved was for \$3,500. Such a variance is not material. The appellant also claims that as the only witness for the appellee was successfully impeached as to character, by several witnesses, therefore there was substantially no evidence in favor of the appellee. Such an impeachment, however, is only one of the modes of testing the credibility of a witness. 1 Greenl. Ev., section 461. The jury, or the court trying the case without a jury, may believe a witness, notwithstanding such an impeachment.

The appellant also claims that his plea of former adjudication was sustained by the evidence. He claims that because the fraud alleged in the complaint was shown to have been known to the appellee at the time he made his motion to be relieved on account of excusable neglect, therefore the proceedings on said motion must be regarded as a bar to any future attack on the judgment even on the ground of fraud. But this position can not be maintained. The two proceedings are entirely different; the material matter in the complaint is the fraud alleged. This was not set forth in the motion; the only ground of the motion was excusable neglect. We think the evidence sustained the finding. The fraud alleged was fully proved. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed Jan. 23, 1885.

The State, for the Use of Bringham, Comm'r of Drainage, v. Turvey *et al.*

No. 11,707.

THE STATE, FOR THE USE OF BRINGHAM, COMMISSIONER OF
DRAINAGE, v. TURVEY ET AL.

99	599
136	453
99	599
170	613

DRAINAGE.—*Complaint.*—*Exhibit.*—In an action to enforce an assessment made under the drainage act of April 8th, 1881, R. S. 1881, section 4273, *et seq.*, the complaint is bad if the assessment made by the commissioner charged with the execution of the work, or a copy thereof, is not filed with the complaint or made a part thereof.

From the Benton Circuit Court.

A. W. Reynolds and *E. B. Sellers*, for appellant.

D. Smith, for appellee.

BLACK, C.—The court below sustained a demurrer to the complaint in a suit brought to collect an assessment for a drain. The proceeding for drainage was in the White Circuit Court, the lands affected being in White and Benton counties, that of the petitioner for drainage being in White county. Said proceeding was had, and the assessment sued on was made, under the act of April 8th, 1881, R. S. 1881, section 4273, *et seq.*

Counsel for the appellant are correct in insisting that the White Circuit Court had jurisdiction of all the lands to be affected, though some of them were situated in Benton county, and that the commissioner charged with the construction of the drain had authority to make his assessments against said lands in both counties. This court has so construed the statute. *Shaw v. State, etc.*, 97 Ind. 23; *Crist v. State, ex rel.*, 97 Ind. 389.

But we observe a fatal defect in the complaint. The assessment made by the commissioner charged with the execution of the work, or a copy thereof, was not filed with the complaint, or made a part thereof, as was necessary, this assessment constituting the lien, to enforce which was the object of the suit. See the cases above cited; also, *Roberts v. State, ex rel.*, 97 Ind. 399; *Neiman v. State, ex rel.*, 98 Ind. 58.

The judgment should be affirmed.

Rairden et al. v. Winstandley.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the costs of the appellant.
Filed Jan. 23, 1885.

No. 11,798.

RAIRDEN ET AL. v. WINSTANDLEY.

PLEADING.—*Promissory Note.—Exhibit.—Defect not Cured by Verdict.*—Where a complaint on a promissory note does not set out such note, nor aver that a copy is filed with the pleading, it is bad on demurrer, and if objection is made by demurrer the defect is not cured by verdict.

From the Lawrence Circuit Court.

W. H. Martin, for appellants.

M. F. Dunn and G. G. Dunn, for appellee.

ELLIOTT, J.—The second paragraph of the appellee's complaint counts upon a promissory note alleged to have been executed by the appellants, but the note is not identified nor in any way referred to as forming a part of the pleading. It is not stated that a copy is filed with the complaint, nor is any reference made to it except to give a general description of its legal tenor and effect. As it is not averred that a copy of the note is filed with the pleading, and as it is not set out therein, it must be held that the court erred in overruling the appellants' demurrer. This is not a case where the pleader can invoke aid from the rule that a verdict will cure a defect, for the reason that the objection was presented by demurrer prior to the verdict. *Price v. Grand Rapids, etc., R. R. Co.*, 13 Ind. 58; *Hiatt v. Goblt*, 18 Ind. 494; *Stafford v. Davidson*, 47 Ind. 319; *Cook v. White*, 47 Ind. 104; *Sinker, Davis & Co. v. Fletcher*, 61 Ind. 276; *Williams v. Osbon*, 75 Ind. 280; *Rogers v. State, ex rel.*, 78 Ind. 329.

Judgment reversed.

Filed Jan. 24, 1885.

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ACCOUNTING.

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ACQUIESCENCE.

See CITY, 5; SCHOOL SUPERINTENDENT, 5.

ADMINISTRATOR.

See DECEDENTS' ESTATES; VENDOR'S LIEN, 3, 4.

ADMISSIONS.

See INSTRUCTIONS TO JURY, 6.

AFFIDAVIT.

See AGREED CASE, 1, 3 to 5; RECEIVER, 1.

AGREED CASE.

1. *Trial by Agreed Case.—Agreement.—Evidence.—Record.*—Where the record shows pleadings, and an issue and trial by the court, and a general finding, though the facts are agreed upon in writing, with an affidavit annexed showing that the controversy is real, it is not an agreed case under section 553, R. S. 1881, but the agreement is simply evidence, and is no part of the record unless made so by bill of exceptions or order of court. *Penn. Co. v. Niblack, 149*
2. *Same.—Assignment of Errors.*—In such case an assignment of error, that the court "erred in rendering judgment for the appellee," presents no question in the Supreme Court. *Ib.*
3. *Jurisdiction.—Affidavit of Facts.—Practice.*—In order to confer jurisdiction upon the court to hear and determine an agreed case, the agreed statement of facts must be supported by an affidavit that the controversy is real and the proceedings in good faith to determine the rights of the parties. *Myers v. Lawyer, 237*
4. *Same.—Transcript.—Supreme Court.*—Upon appeal from a judgment rendered in such case, the transcript must embrace a copy of such affidavit; otherwise the record presents no question for decision. *Ib.*
5. *Same.—Statement of Clerk.*—In such case the statement of the clerk that such affidavit was filed will not supply such omission. *Ib.*

AGREEMENT.

See AGREED CASE; BAILMENT; CONTRACT; EJECTMENT, 2; INSURANCE, 2; JUDGMENT, 2; MARRIAGE; MORTGAGE, 8, 9; PRINCIPAL AND SURETY; STATUTE OF FRAUDS; STATUTE OF LIMITATIONS; TAXES, 12; TRUST AND TRUSTEE; VENDOR AND VENDEE, 3, 9 to 14; VENDOR'S LIEN, 5.

ALIMONY.

See DIVORCE, 2, 3.

AMENDMENT.

See PARTITION, 10; PLEADING, 4, 5; PRACTICE, 8, 20; RAILROAD, 16, 17.

ANIMALS.

See RAILROAD, 1, 3 to 11.

ANTENUPTIAL CONTRACT.

See MARRIAGE.

APPEAL.

See APPEAL BOND; CITY, 4, 8, 9; CRIMINAL LAW, 14; TIME.

APPEAL BOND.

1. *Liability of Obligors.—Rent of Land Pending Appeal in Action for Possession.—Statute Construed.*—The obligors upon an appeal bond, given by a judgment defendant on appeal to the Supreme Court from a judgment for the possession of real estate, are liable for the amount of the money judgment, and for the rental value of the real estate pending the appeal, under section 44, chapter 37, R. S. 1843, which was continued in force by section 802 of the code of 1852. *Opp v. Ten Eyck, 345*
2. *Same.*—They are thus liable under section 790, code of 1852 (section 1221, R. S. 1881), although there may be no stipulation in the bond, that the obligors shall be liable for the mesne rents. *Id.*

ARGUMENT OF COUNSEL.

See PRACTICE, 9, 23.

ASSAULT AND BATTERY.

Trespass.—Complaint.—A complaint to recover damages for an assault and battery need not aver in terms that the assault and battery was unlawful. *Benson v. Bacon, 156*

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See SALE.

ASSIGNMENT OF ERROR.

See AGREED CASE, 2.

1. *Pleading.—Practice.*—An assignment of error in the Supreme Court, that neither paragraph of a complaint states facts sufficient to constitute a cause of action, presents no question. Such an assignment can only be made in regard to the complaint as a whole, and if either paragraph is sufficient, such assignment will not avail to reverse the judgment. *Louisville, etc., R. W. Co. v. Peck, 68*
2. If only one of several paragraphs of a complaint be good, an assignment of error that the complaint was bad for want of sufficient facts is not supported. *Wabash, etc., R. W. Co. v. Nice, 152*
3. A joint assignment of errors must be well taken by all of the appellants who join in the assignment, or else it is not well taken by any, and can not be sustained. *McKee v. Hungate, 168*
4. *Same.—Names of Parties.*—Where the names of certain parties to the record appear among the names of the appellants and also of the appellees, but they do not otherwise appear to be appellees, and they brief and submit the case as appellants, they will be deemed appellants in the Supreme Court. *Id.*
5. Where two or more appellants assign error jointly, any error assigned which is good only as to one of the appellants will not be available. *Lake v. Lake, 339*
6. Assignments of error, such as "rendering judgment for the defendant on the finding," and "not rendering judgment for the plaintiff for the full value of the corn replevied," are too general to present any question; and, besides, such objections can not be made for the first time in the Supreme Court. *Foster v. Bringham, 505*

ASSIGNOR AND ASSIGNEE.

See INSURANCE; JUDGMENT, 2; PRINCIPAL AND SURETY.

ASSUMPSIT.

See FRAUDULENT CONVEYANCE, 3.

ATTACHMENT.

Suit on Bond. — Evidence. — Record. — Misnomer. — Parties. — Partnership. — Name. — Corporation.—Suit by "D. M. Osborne & Co." upon an attachment bond given in a suit against D. M. Osborne and others unknown, described as partners, in which "D. M. Osborne & Co." appeared.

Held, that the plaintiff could maintain the suit, having been really the defendant in the attachment suit, though by a wrong name and description, and that the record of that suit was admissible in evidence for the plaintiff, and so also was proof that the writ of attachment was levied upon the plaintiff's property. *Hedrick v. D. M. Osborne & Co., 143*

ATTORNEY.

See COURTS, 2; CRIMINAL LAW, 4, 14; PRACTICE, 9, 19, 23; PROSECUTING ATTORNEY.

ATTORNEY'S FEES.

See DRAINAGE, 4.

AUDITOR OF STATE.

See EJECTMENT, 2.

BAILIFF.

See JURY.

BAILMENT.

Mutuum or Exchange. — Sale. — Warehouseman. — Mingling of Grain. — Tenants in Common. — Ownership. — Demand. — Conversion.—In November, 1882, one K., a miller and warehouseman, received of W. five hundred bushels of wheat, and agreed verbally to store such wheat until July 1st, 1883; that before that date W. might sell the wheat when he pleased, or that wheat would be returned if called for. The wheat was mingled with other wheat purchased by K., in his flouring-mill, which ground, when running, about two hundred bushels of wheat per day, and thereafter, until March 3d, 1883, ran about one-half of the time. In February, 1883, W. received from K. a writing, in evidence of the aforesaid verbal contract. On March 3d, 1883, K. ceased to run the mill, and, between that date and July 1st, 1883, he executed to the defendant S. and others a chattel mortgage on all the wheat in the mill, amounting at the time to nineteen hundred bushels. On June 30th, 1883, W. demanded of K. the wheat or the money on his contract, but received neither; and, on July 3d, 1883, W. demanded of the defendants S. *et al.*, while they were removing the wheat from the mill, that they should leave five hundred bushels thereof in the mill for him, which they refused to do, and afterwards converted all the wheat, and the proceeds thereof, to their own use.

Held, upon the foregoing facts, that the contract of K. with W., verbal or written, was not a *mutuum* or exchange, nor a sale of the wheat, but that it was a contract of bailment, pure and simple.

Held, also, that, under such contract, K. and W. became and were tenants in common of the nineteen hundred bushels of wheat, remaining in the mill, W. to the extent of his five hundred bushels, and K. as to the residue; and that K. could not sell or mortgage W.'s wheat to the defendants, so as to divest the plaintiff's title thereto, or to authorize its removal from the mill, after W.'s demand that it should be left there.

ANIMALS.

See RAILROAD, 1, 3 to 11.

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Held, upon the foregoing facts, that the contract of K. with W., verbal or written, was not a *mutuum* or exchange, nor a sale of the wheat, but that it was a contract of bailment, pure and simple.

Held, also, that, under such contract, K. and W. became and were tenants in common of the nineteen hundred bushels of wheat, remaining in the mill, W. to the extent of his five hundred bushels, and K. as to the residue; and that K. could not sell or mortgage W.'s wheat to the defendants, so as to divest the plaintiff's title thereto, or to authorize its removal from the mill, after W.'s demand that it should be left there.

Held, also, that when, after such demand, the defendants removed the wheat from the mill and converted the same to their own use, they became and were liable in damages to the plaintiff, as the owner of the wheat so converted, for its fair value. *Schindler v. Westover*, 395

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Discharge.—Trust and Trustee.—A judgment on a demand for money had and received, not shown to be based on a technical or express trust, is barred by a discharge in bankruptcy. *Goddin v. Neal*, 334

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Epstein v. Greer, 85 Ind. 372, as to the liability of obligors upon an appeal bond for mesne rents, disapproved. *Opp v. Ten Eyck*, 345

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See INSURANCE, 1.

CIRCUIT COURTS.

See COURTS; PROSECUTING ATTORNEY.

CITY.

See WATERCOURSE, 2.

1. *Sidewalk.—Negligence.—Evidence.*—In a suit against a city for an injury received in consequence of an obstruction upon a sidewalk, evidence that others had passed over it without injury is not admissible; nor is evidence that the plank crossing, which was the obstruction, was not different from the generality of crossings of like character in the city.
Bauer v. Indianapolis, 56
2. *Annexation Proceedings.—Taxes.—Injunction.—Complaint.—Written Instrument.—Foundation of Action.—Exhibit.*—In a suit by certain owners of real estate to enjoin the collection of certain municipal taxes, upon the ground that their real estate had not been lawfully annexed to the municipality, the annexation proceedings are not a written instrument within the meaning of section 78 of the civil code of 1852 (section 362, R. S. 1881), and are not the foundation of the suit; and, therefore, the copy of such proceedings, filed as an exhibit, does not become a part of the pleading, and can not be considered, in determining its sufficiency on demurrer.
Logansport v. La Rose, 117
3. *Same.—Annexation of Unplatted Land.—Jurisdiction of Common Council.*—In the annexation of contiguous territory, under the provisions of section 3195, R. S. 1881, the common council of an incorporated city is not authorized to extend the boundary of such city, by resolution, so as to include adjoining lands which have not been laid off in lots and platted, and a record made of such plat; and any such attempted annexation of unplatted lands is void for want of jurisdiction, and the levy and attempted collection of municipal taxes, on such lands so annexed, may be enjoined by the decree of the proper court. *Ib.*
4. *Same.—Annexation of Contiguous Territory.—Petition of Common Council.—Board of County Commissioners.—Errors in Proceedings.—Remedy by Appeal.*—Under the provisions of sections 3196 and 3197, R. S. 1881, an incorporated city may procure the annexation of contiguous territory, whether platted into lots or otherwise, without the consent of the owner or owners thereof, upon the petition of its common council to the board of commissioners of the county wherein such city is situate, and the order of such board granting the prayer of such petition; and, if there be errors in such proceedings, the remedy of the party aggrieved thereby is an appeal to the circuit court of the county, and not a suit for an injunction. *Ib.*
5. *Same.—Acquiescence.—Equitable Defence.—Laches and Neglect.—Equity.*—Where the annexation proceedings are of doubtful legality, or even clearly illegal, if the residents and property owners of the annexed territory are guilty of laches and neglect in asserting their legal rights, and acquiesce for a number of years in the validity of such annexation, during which time they voted for city officers, and were represented in the common council of the city by councilmen of their own selection, and by their action and the votes of their representatives large debts were contracted by the city for its improvement, in all the benefits of which they shared, such long-continued acquiescence in such annexation constitutes a complete equitable defence in bar of this suit to enjoin the collection of the city taxes, assessed against the property so annexed, in a court of equity. *Ib.*
6. *Opening Streets.—Commissioners.*—A person who is financially interested

in the opening of a street, or who is father-in-law to a person whose property will be affected by such opening, is incompetent to act as a commissioner, in the assessment of benefits and damages.

Bradley v. Frankfort, 417

7. *Same.*—*Objections to Commissioners.*—*Waiver.*—If a person is served with notice of the second meeting of the commissioners, and before an assessment against his property, has knowledge of the incompetency of any commissioner, he must make the objection then and there. If he does not, he will be deemed to have waived it. *Ib.*
8. *Same.*—*Objections on Appeal to Circuit Court.*—If his objection is overruled, or not reported to the common council, or disregarded by the common council, it may be renewed, and tried on appeal in the circuit court. *Ib.*
9. *Same.*—*Regularity of the Appointment of Commissioners, etc.*—No question can be made in the circuit court, as to the regularity of the appointment of commissioners, except by a verified answer. *Ib.*
10. *Verdict.*—*Special Finding of Facts.*—*Street.*—*Sidewalk.*—Suit against a city for injury in consequence of an obstruction in a sidewalk: Answering interrogatories, the jury found the obstruction to have been a water-box 6 by 7½ inches, and 1½ inches above the level of the sidewalk; that the plaintiff had knowledge of it. The plaintiff, in the dark when it was difficult to see it, stumbled over it and was injured. *Held*, that the defendant should have judgment, notwithstanding an adverse general verdict. *Indianapolis v. Cook*, 10

COLLATERAL ATTACK.

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COMMISSIONER TO ASSESS DAMAGES.

See CITY, 6, 9.

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1. *Breach.*—*Measure of Damages.*—*Mortgage.*—*Husband and Wife.*—Suit by a married woman, alleging that she had, at the instance of her husband and the defendant, mortgaged her lands to secure a loan of \$3,000, upon an agreement with the defendant that he would receive the money and apply \$1,000 of it in payment of an older mortgage on part of the same lands, given to secure her husband's debt, and would pay \$2,000 to her husband; and for breach, that the defendant received the money, did not apply said \$1,000 as agreed, but converted it to his own use, by reason whereof she lost her land. It appeared in evidence that \$300 had been paid by her husband upon the older mortgage.

Held, that the measure of damages could not exceed \$700 and the interest thereon. *Sharpe v. Graydon*, 232

2. *Same.*—*Evidence.*—In such case it is error to exclude evidence by the husband as a witness to the effect that the loan was made with a view

to other purposes than the payment of the prior mortgage; so, also, to exclude evidence showing that the husband, and not the defendant, nine years before the trial, received the borrowed money, and that he disposed of the whole of it, paying \$300 on the older mortgage. *Id.*

CONVERSATIONS.

See HUSBAND AND WIFE, 2.

CONVERSION.

See BAILMENT; CONTRACT; PRINCIPAL AND SURETY.

CONVEYANCE.

See DEED; EVIDENCE, 4, 6; FRAUDULENT CONVEYANCE; INFANT; JUDGMENT, 3; MARRIED WOMAN, 2 to 4; MORTGAGE; PARTITION, 5, 6, 8; QUIETING TITLE, 1 to 3, 5; TAXES, 1, 10, 11; VENDOR AND VENDEE, 3, 5 to 7, 13, 14.

COPY.

See CITY, 2; DRAINAGE, 1, 5; PLEADING, 6; WILLS, 11.

CORPORATION.

See ATTACHMENT; DRAINAGE, 3; RAILROAD.

1. *Mandate*.—Officers of a corporation who, upon the expiration of their terms, refuse to deliver to their successors books, papers, accounts, or the like, which came to their hands as such, may be compelled to do so by mandate. *Fasnacht v. German, etc., Ass'n, 133*
2. *Dissolution*.—Until a corporation once organized has been adjudged dissolved, in a direct proceeding for that purpose, instituted by the State, its existence can not be questioned by a private person. *Barren Creek, etc., Co. v. Beck, 247*

COSTS.

See NEW TRIAL, 5; PARTITION, 2, 3; SUPREME COURT, 12.

COUNTY.

See DRAINAGE, 2.

COUNTY AUDITOR.

See DRAINAGE, 4; SCHOOL SUPERINTENDENT, 2.

School Fund Mortgage.—Public Policy.—Breach of Official Bond.—A mortgage, executed by a county auditor to secure a loan of a part of the common school fund made to himself, is valid or invalid at the option of those having a supervisory control of such fund. The loan is unlawful as against public policy, and is a breach of the auditor's official bond; but the mortgage may, both as to the auditor and those claiming under him, be resorted to and enforced, as a means of reimbursing the fund, looking only to the auditor and his sureties for any deficiency that may remain after the mortgaged land has been exhausted.

State, ex rel., v. Levi, 77

COUNTY CLERK.

See AGREED CASE, 5; NEW TRIAL, 5; PARTITION, 2, 3.

COUNTY COMMISSIONERS.

See CITY, 4; DRAINAGE, 1; RAILROAD, 11.

COUNTY TREASURER.

1. *Liability of Sureties on Bond*.—Where a county treasurer is elected his own successor, his sureties for the first term are liable for any defalcation existing at the end of that term. *Rogers v. State, ex rel., 218*
2. *Same.—Defalcation.—Application of Payments*.—A county treasurer, having served two successive terms, was a defaulter at the end of each, and

afterwards made payments upon the aggregate without any designation as to their application by any one. Some such payments were derived, 1. From loans and investments of the moneys for which he was in default. 2. From sources having no connection with the office. The sureties on both bonds were equally solvent.

Held, in a suit on the first bond, that the court should apply payments from the funds of the first class to the defalcation of the term from the moneys of which the loans and investments were made, and those of the second class to the defalcation of the first term. *Ib.*

3. *Same.—Settlements.—Pleading.*—To a suit on a county treasurer's bond an answer that at the close of his term he had accounted for all moneys to, and settled with, the county board, is bad on demurrer. *Ib.*
4. *Same.—Payment.—Reply.—Harmless Error.*—To an answer of payment to a complaint on a county treasurer's bond, a reply that such payment was made out of money coming to the officer as such, during a succeeding term of office, is bad; but it is a harmless error to hold it good on demurrer if it appears by the record that there was no evidence whatever offered in its support, and a finding in answer to interrogatories showing that it was not true. *Ib.*
5. *Same.—Evidence.—Settlements of County Treasurer.—Harmless Error.*—In a suit on a county treasurer's first bond, the refusal to admit in evidence his annual settlements during his succeeding term of office is a harmless error where it appears that their admission could not have changed the result. *Ib.*
6. *Same.—Parol Testimony as to Contents of Books of Account.*—Competent witnesses who have examined a county treasurer's books may testify to the amount of the treasurer's receipts and disbursements, as they appear by the books. *Ib.*

COURTS.

See DRAINAGE, 2; EVIDENCE, 3; NEW TRIAL, 5; PRACTICE, 5, 19.

1. *Jurisdiction.*—The circuit court, being a court of superior general jurisdiction, has the jurisdiction inherent in such a court, and a specific statute giving it jurisdiction in a given case is not required.
Curtis v. Gooding, 45
2. *Power to Appoint Attorneys to Assist Prosecuting Attorney.—Liability of County.*—The circuit court has inherent discretionary power to appoint attorneys to assist the prosecuting attorney in criminal causes, and to allow compensation payable out of the county treasury, nor will its action be reviewed save in cases where a clear abuse of discretion appears.
Tull v. State, ex rel., 238
3. *Practice.—Trial by Court.—Taking Under Advisement.—Statute Construed.*—The requirement of section 551, R. S. 1881, that the court trying an issue shall not hold the matter under advisement more than 60 days, is directory, and a failure to obey it will not affect the determination when made afterwards.
Smith v. Uhler, 140

COVENANTS.

See DEED, 6; VENDOR AND VENDEE, 5.

CREDITORS.

See DEED, 4; FRAUDULENT CONVEYANCE; PRINCIPAL AND SURETY; SALE; VENDOR'S LIEN, 4.

CRIMINAL LAW.

See PROSECUTING ATTORNEY.

1. *Manslaughter.—Indictment.—Duplicity.*—An indictment, charging that the defendant at, etc., on, etc., did unlawfully and feloniously, with-

out malice, involuntarily kill A. by shooting, etc., the defendant then and there being in the commission of an unlawful act, to wit, drawing a deadly weapon, to wit, a revolver, upon A., and not in defence of his person or property, or of those entitled by law to his protection, whereby, etc., shows an involuntary killing without malice, while committing an unlawful act, and is good as a charge of manslaughter and is not bad for duplicity. *Surber v. State*, 71

2. *Same.—Evidence.—Declarations.—Res Gestæ.*—Declarations of others, in the presence of the accused, immediately following the fatal act, are part of the *res gestæ*, and admissible in evidence against the accused. *Ib.*
3. *Same.—Practice.—Instructions.*—Instructions asked after the argument begins may be refused without error. *Ib.*
4. *Same.—Attorneys.*—Counsel may be called in behalf of the State to assist the prosecuting attorney, and the argument may be opened either by such counsel or by the prosecuting attorney. *Ib.*
5. *Same.—Involuntary Killing while Engaged in Commission of Unlawful Act.*—Our statute makes it an offence to draw a deadly weapon upon another, and a person who does this commits an unlawful act, and if death results he is guilty of felonious homicide. *Ib.*
6. *Same.—Voluntary Drunkenness.*—The voluntary drunkenness of the defendant does not change the unlawful character of the act of purposely pointing a loaded pistol at another. *Ib.*
7. *Sufficiency of Evidence.—Supreme Court.*—In criminal as well as in civil causes, there must be an absolute failure of evidence on some material point to authorize the Supreme Court to reverse the judgment merely on the evidence. *Dolke v. State*, 229
8. *Same.—Sale of Intoxicating Liquor to Minor.—Evidence.*—Where evidence is given on the trial, on May 1st, 1884, of a defendant charged with a sale and giving away of intoxicating liquor to a minor, that the prosecuting witness "will be twenty-one years old the first day of August next," the court is justified in finding from the evidence that on the 15th day of November, preceding the day of trial, the witness was under twenty-one years of age. *Ib.*
9. *Jeopardy.—Discharging Jury.*—If, after a jury is empanelled and sworn, it be disclosed that a juror is incompetent because not a freeholder or householder, and the accused declines to object to the juror, and the court thereupon, of its own motion, discharges the jury, the accused has been once in jeopardy and should be released. *Adams v. State*, 244
10. *Practice.—Sufficiency of Evidence.—Supreme Court.*—In criminal as in civil causes, where the evidence in the record tends to sustain the verdict on every material point, the Supreme Court will not reverse the judgment merely on the evidence. *Wachstetter v. State*, 290
11. *Same.—Refusal of Instructions.—Error.*—There is no available error in the court's refusal to give an instruction, when the record shows that the substance and law of such instruction had been given the jury in the court's own instructions, nor where the instruction refused gave undue prominence to an isolated question in the cause, upon which the defendant's guilt or innocence of the offence charged did not necessarily depend. *Ib.*
12. *Same.—Cross-Examination of Witness.—Discretion of Court.—Abuse of.—Supreme Court.*—How far the cross-examination of an adverse witness may be extended, in any case, is a question largely in the discretion of the trial court; and, unless the record shows an absolute abuse of such discretion, its exercise will not be reviewed by the Supreme Court. *Ib.*

13. *Same.—Impeachment of Witness.—General Moral Character.—Cross-Examination.*—Under section 1803, R. S. 1881, in the impeachment of a witness, the subject-matter of the inquiry, whether upon the examination in chief or the cross-examination, is his general moral character; and where an impeaching witness has testified in chief that, as to one of the elements of moral character, the reputation of the party sought to be impeached is good, it is within the discretion of the trial court to allow such witness to be cross-examined in regard to the party's reputation as to any other or all of the essential and constituent elements of good moral character. *Ib.*
14. *Appeal.—Agreement.*—The statute gives an appeal only from a final judgment; and the agreement of a prosecuting attorney can not confer the right to appeal from an interlocutory judgment against the defendant upon demurrer to a plea. *Wingo v. State, 343*
15. *Former Conviction.*—Conviction for "unlawfully carrying a dangerous weapon" is no bar to a prosecution for any crime. *Davidson v. State, 366*
16. *Same.—Carrying Dangerous Weapon.*—Conviction for a violation of section 1985, R. S. 1881 (carrying a deadly weapon concealed or openly with intent to injure another), is no bar to a prosecution for violation of section 1984 (drawing or threatening to use such weapon). *Ib.*
17. *Homicide.—Exhibiting Clothing Worn by Deceased to Jury.—Evidence.*—Upon the trial of a person accused of homicide, the clothing worn by the deceased at the time he was killed may be exhibited to the jury as evidence. *Story v. State, 413*
18. *Same.—Province of Jury.—Inferences.*—In such case it is the province of the jury to determine what inferences are to be drawn from the condition and appearance of the clothing, in connection with the other evidence, and it is not error to refuse to give an instruction which denies this right. *Ib.*
19. *Same.—Instructions.—Supreme Court.*—The rule that the instructions in a case are all to be taken together, and that if they thus present the law correctly and without material contradiction, they will be sustained by the Supreme Court, applies as well to criminal prosecutions as to civil actions. *Ib.*
20. *Same.—Self-Defence.*—One who takes another's life must be "himself without fault," to justify his acquittal on the ground of self-defence, and it is proper for the trial court to so instruct the jury. *Ib.*
21. *Same.—Retreating.*—Where both parties are in the wrong, neither can justify the taking of life without retreating. *Ib.*
22. *Same.—Instruction.*—It is not error in such case to instruct the jury that if a person voluntarily and unlawfully enters into a mutual combat, or provokes a conflict by his own wrongful act, he has no right to take his adversary's life; yet, if he withdraws from it in good faith, and is then pursued, he may then exercise his right of self-defence, but that in such case it must appear, in order to establish excusable homicide in self-defence, that the party had retreated as far as the fierceness of the assault would permit. *Ib.*
23. *Gaming.—Evidence.*—A charge in an indictment, that the defendant played a game of pool upon a pool table with another person, and thereby won money from him, is sustained by proof that the parties played under an arrangement that the losing party should pay the owner of the table the amount charged for the use of it, and that the defendant won the games, and the other party paid for them. *Alexander v. State, 450*
24. *Same.*—It is not necessary to prove the winning of the whole amount charged in the indictment. *Ib.*

CROSS-COMPLAINT.

See QUIETING TITLE, 1.

CROSS-EXAMINATION.

See CRIMINAL LAW, 12, 13; WITNESS, 4, 5, 8, 9.

DAMAGES.

See ASSAULT AND BATTERY; CONTRACT, 1; PARTNERSHIP, 2; RAILROAD, 2, 17; SUPREME COURT, 10; TRESPASS; VENDOR AND VENDEE, 4 to 8.

DANGEROUS WEAPON.

See CRIMINAL LAW, 1, 5, 6, 15, 16.

DECEDENTS' ESTATES.

See DEED, 4; VENDOR'S LIEN, 3, 4; WILLS.

1. *Appointment of Administrator.*—That a prior administrator has been discharged because he could find no assets does not prevent the appointment of an administrator *de bonis non*; nor is the fact that proceedings are pending for the removal of the latter a reason for abatement or stay of proceedings of a suit instituted by him. *Langedale v. Woollen, 575*
2. *Same.—Collection of Debts.*—Where there is no widow, and no debts against an estate, the heirs may collect debts due the estate without an administrator, but this can not prevent the appointment of an administrator. *Ib.*
3. *Same.—Interrogatories to Jury.*—In a suit by an administrator to recover money held in trust, it is immaterial whether there are demands against the estate or not, and interrogatories upon the subject should not be sent to the jury. *Ib.*

DECLARATIONS.

See CRIMINAL LAW, 2; DEED, 5.

DEDICATION.

See HIGHWAY.

DEED.

See FRAUDULENT CONVEYANCE; INFANT; JUDGMENT, 3; MARRIED WOMAN, 2 to 4; PARTITION, 5, 6, 8; QUIETING TITLE, 1 to 3, 5; TAXES, 1, 10, 11; VENDOR AND VENDEE, 3, 5 to 7, 13, 14.

1. *Execution of.—Delivery an Essential Requisite.—Intention of Grantor.*—The delivery of a deed is an essential requisite of its execution. The deed takes effect from its delivery; and if it should pass into the grantee's possession without the grantor's intention that it should become operative, and be used for the purpose apparently intended, it has no legal existence as a deed, and no person can gain any rights thereunder. *Fitzgerald v. Goff, 28*
2. *Same.—Unauthorized Delivery.—Record of Deed.—Innocent Purchasers.*—A deed delivered without the knowledge, consent or acquiescence of the grantor, is no more effective than a deed wholly forged would be to pass the title to the grantee, and the record of such deed will afford no protection to innocent purchasers. *Ib.*
3. *Execution of.—Delivery an Essential Requisite.*—The delivery of a deed is an indispensable requisite of its due execution; the deed takes effect from its delivery, and though signed, sealed and acknowledged in proper form, if it pass into the grantee's possession without delivery by the grantor, it will not operate, as between the parties thereto, to convey the title to the real estate described therein.

Jones v. Loveless, 317

4. *Same.*—*Voluntary Unrecorded Deed.*—*Delivery after Grantor's Death.*—*Testamentary Disposition.*—*Rights of Grantor's Creditors.*—*Relation.*—Where the grantor signs and acknowledges a voluntary deed to his children as grantees, in consideration of natural love and affection, and, without having such deed recorded in the proper recorder's office, seals it up in an envelope and deposits the same with his agent to be delivered to the grantees after his death, and where such deed by its terms is not to take effect until after the grantor's death, the deed is an attempted testamentary disposition of the land described therein, and, if not executed with the legal formalities of a will, is inoperative to pass the title to the land to the grantees. And where the grantor dies insolvent long after he placed such deed in the hands of his agent, the subsequent delivery of the deed will be ineffectual to defeat the rights of the grantor's creditors and administrator to sell the land for the payment of his debts; for the rule is that the doctrine of relation, which alone could give effect to such deed, will not be permitted to apply so as to do wrong or injury to strangers to the deed. *Id.*
5. *Mortgage.*—*Evidence.*—*Witness.*—*Declarations of Party in Possession.*—*Vendor and Vendee.*—*Husband and Wife.*—In ejectment by the grantee against the heirs of the grantor, it was in question whether the deed was intended as a mortgage. It was in proof that the grantor remained in possession, erected buildings and insured them, and made other improvements.
Held, that the declarations of the grantor, while negotiating for said buildings, insurance, and while making improvements, concerning the acts so being done, were proper evidence for the defendants, so far as they tended to characterize such acts.
Held, also, that the grantee and his wife were not competent witnesses.
Creighton v. Hoppis, 369
6. *Breach of Covenant.*—*Seizin.*—In a suit for breach of covenant of seizin in a deed, the plaintiff by his evidence showed a chain of deeds beginning with one from K., made in 1868, and extending to the defendant, and then title in the State of Iowa granted by the United States in 1850.
Held, that title in the State of Iowa in 1850 was not inconsistent with title in K. in 1868, and, therefore, this evidence failed to show a breach of the covenant, the burden of which, under an answer of general denial, was on the plaintiff.
Hamilton v. Shoaff, 63
7. *Infancy.*—*Deed.*—*Delivery.*—A deed of an infant, signed and acknowledged, and placed in the hands of another for delivery, but not actually delivered until full age, is not voidable for infancy.
Sims v. Smith, 469
8. *Quiet title.*—*Married Woman.*—*Evidence.*—Upon a complaint to quiet title, alleging the facts to be that the plaintiff, a married woman, was seized of the land and executed a conveyance thereof while an infant, in which her husband joined, and that she had disaffirmed the deed, is not supported by proof that the deed was ineffectual for want of such a certificate of acknowledgment as the statute required to give validity to the deed of a married woman. *Id.*
9. *Execution of.*—*Delivery an Essential Requisite.*—*Intention of Grantor.*—The delivery of a deed is an essential requisite of its execution. The deed takes effect from its delivery; and if it should pass into the grantee's possession without the grantor's intention that it should become operative, and be used for the purpose apparently intended, it has no legal existence as a deed, and no person can gain any rights thereunder.
Fitzgerald v. Goff, 28
10. *Same.*—*Unauthorized Delivery.*—*Record of Deed.*—*Innocent Purchaser.*—A deed delivered without the knowledge, consent or acquiescence of

the grantor, is no more effective than a deed wholly forged would be to pass the title to the grantee, and the record of such deed will afford no protection to innocent purchasers. *Id.*

11. *Evidence.—Estoppel.*—A deed of lands, describing the first line as running from the same initial point "south one hundred rods," and otherwise corresponding with the complaint, shows no title beyond the distance of 100 rods; but if the stone mentioned in the complaint be still farther south, and the plaintiffs, ignorant of the matter, have been induced to purchase, by a device of the defendant who had knowledge, relying upon his representations that the first line of the tract extended south to the stone, the latter will be estopped in equity to dispute the fact. *Pitcher v. Dove, 175*

DEFALCATION.

See COUNTY TREASURER.

DEFAULT.

See JUDGMENT, 5, 6, 7.

DEFECTS CURED.

See JUDGMENT, 5; PARTIES; PLEADING, 3, 6; PRACTICE, 1; RAILROAD, 1.

DELIVERY.

See DEED, 1 to 4, 7.

DEMAND.

See BAILMENT; EJECTMENT, 1; QUIETING TITLE, 10; TRUST AND TRUSTEE.

DEMURRER.

See CRIMINAL LAW, 14.

DEMURRER TO EVIDENCE.

See NEW TRIAL, 1.

Where the plaintiff's evidence tended to show every material fact necessary to his recovery, and from it the jury might properly have found a verdict in his favor, a demurrer by the defendant to such evidence should be overruled. *Nordyke, etc., Co. v. Van Sant, 188*

DEPOSITION.

1. *Certificate.—Mistake.—Clerical Error.*—Where an officer by whom a deposition has been taken states in his certificate that the *deponent*, instead of the *deposition*, was reduced to writing, the mistake is a mere harmless clerical error. *Payne v. West, 390*
2. *Practice.—Rule of Court, Enforcement of.*—Where a rule of court forbidding the removal of papers from the files has been violated by an attorney in the cause, as to depositions, the court may strike out his motion to suppress parts thereof. *Langsdale v. Woollen, 575*

DESCRIPTION.

See ATTACHMENT; MORTGAGE, 4; QUIETING TITLE, 4, 5; RAILROAD, 16; TAXES, 7, 11, 12.

DILIGENCE.

See JUDGE.

DISCRETION.

See COURTS, 2; CRIMINAL LAW, 12, 13; MORTGAGE, 6; PRACTICE, 20; RECEIVER, 1; WITNESS, 8, 9.

DISQUALIFICATION.

See CITY, 6.

DIVORCE.

1. *Custody of Children*.—Where, upon granting a divorce, the custody of a child is given to the wife, with directions forbidding its removal from the court's jurisdiction, a disregard of such directions does not *per se* give the father a right to such custody. *Joab v. Sheets*, 323
2. *Alimony*.—Where, for the fault of the husband, a divorce is granted to the wife with custody of the only child, the husband's property, beyond all his debts, being worth at least \$3,500, alimony in the sum of \$1,590 is not excessive. *Metzler v. Metzler*, 384
3. *Same*.—*Parties*.—*Pleading*.—*Fraudulent Conveyance*.—In a suit by a wife for a divorce, making also defendant a stranger, with a view to subject lands conveyed to him to the payment of alimony, the complaint against him is bad on demurrer, if it do not show that the conveyance was made to hinder or defraud, and that it was without adequate consideration. *Ib.*

DRAINAGE.

1. *Complaint to Recover Assessment*.—*Exhibit*.—*County Commissioners*.—*Jurisdiction*.—*Collateral Attack*.—A complaint to recover an assessment for drainage, where the proceedings for drainage were before the county board, is not founded upon the order of the board, but upon the assessment; the order establishing the drain need not be made part of the complaint, and if it appear that by petition and proper notice the board had jurisdiction, the order can not be attacked collaterally. *Smith v. Clifford*, 113
2. *Same*.—*Judicial Knowledge*.—*County Boundaries*.—Courts will take judicial knowledge of the county in which a public ditch is located, and also the lands affected thereby, if the *termini* and route of the ditch, and the section, township and range of the lands, be shown by averment. *Ib.*
3. *Repeal of Statute*.—The act concerning drainage, of March 10th, 1873, has not been repealed by the act of March 13th, 1879, as to corporations organized prior to the latter date. *Barren Creek, etc., Co. v. Beck*, 247
4. *Attorney's Fees*.—*County Auditor*.—The act concerning drainage by proceedings before county boards (R. S. 1881, sections 4285, 4317), makes no provision for the payment of attorney's fees out of the county treasury, and any allowance therefor by viewers is void, and there is no duty on the part of the auditor to issue a warrant therefor. *Kersey v. Turner*, 257
5. *Complaint*.—*Exhibit*.—In an action to enforce an assessment made under the drainage act of April 8th, 1881, R. S. 1881, section 4273, *et seq.*, the complaint is bad if the assessment made by the commissioner charged with the execution of the work, or a copy thereof, is not filed with the complaint or made a part thereof. *State, etc., v. Turvey*, 593

DRUNKENNESS.

See CRIMINAL LAW, 6.

EASEMENT.

See WATERCOURSE.

EJECTMENT.

See APPEAL BOND; DEED, 5.

1. *Complaint*.—*Demand for Possession*.—In an action of ejectment for the recovery of real estate, no prior demand for the surrender of possession is necessary, and none need be alleged in the complaint, unless it be apparent from its other allegations that the relation of landlord and tenant exists, or has existed, between the plaintiff and defendant in regard to such real estate. *McCaslin v. State, ex rel.*, 423

2. *Real Estate Owned by State.—Officers of the State.—Auditor of State.—Statutory Power.—Agreement.*—An officer of the State has no power or authority over any real estate, owned by the State, except such as has been or may be conferred upon such officer by positive statute; and where the State sues for the recovery of such real estate, and the defendant relies upon an alleged agreement with the auditor of State in defence of such suit, unless it appears that the auditor of State was expressly authorized by statute to make the agreement, as against the State such agreement is absolutely void. *Ib.*
3. *Same.—Growing Crops.*—Where the plaintiff in ejectment recovers the land, he is entitled to the crops growing or cut and shocked thereon, which were planted after the commencement of his action. *Ib.*

ELECTIONS.

See SCHOOL SUPERINTENDENT.

1. *Ballots.*—The statute, R. S. 1881, section 4701, requiring election tickets to be printed on plain white paper, prescribes no grade, quality or thickness of paper, and does not require absolute uniformity. *State, ex rel., v. Wasson, 261*
2. *Same.—Evidence.*—Where the question involved is whether certain tickets printed on paper, plain and white, but unusually heavy, were lawful, evidence by a printer that for ten years he had been in the habit of printing tickets on ordinary paper, and that paper such as was used for the tickets in question had not been so used, is immaterial, and proof that the person whose right to office was in question, because of the use of such thick paper, had no agency in having such paper used, is merely harmless. *Ib.*

EMBLEMENTS.

See EJECTMENT, 3.

EMINENT DOMAIN.

See RAILROAD, 16.

EMPLOYER AND EMPLOYEE.

See NEGLIGENCE, 5.

EQUITY.

See CITY, 5; EXECUTION, 4; FRAUDULENT CONVEYANCE, 1, 3; SUBROGATION.

ESTOPPEL.

See CITY, 5; FRAUDULENT CONVEYANCE, 7; JUDGMENT, 4; QUIETING TITLE, 5 to 7; VENDOR'S LIEN, 4; WATERCOURSE, 2.

EVIDENCE.

See AGREED CASE, 1; ATTACHMENT; CITY, 1; CONTRACT, 2; COUNTY TREASURER, 4, 6; CRIMINAL LAW, 2, 7, 8, 10, 17, 18, 23, 24; DEMUR-
 RER TO EVIDENCE; ELECTIONS, 2; FRAUDULENT CONVEYANCE, 4, 5,
 6, 8; HABEAS CORPUS; HUSBAND AND WIFE, 2, 5; INSTRUCTIONS TO
 JURY, 6; INTOXICATING LIQUOR, 3; JUDGMENT, 7; MARRIED WO-
 MAN, 2; MECHANIC'S LIEN; NEGLIGENCE, 7; NEW TRIAL, 1; PAR-
 TITION, 8, 9; PRACTICE, 15, 16, 21 to 23; PROMISSORY NOTE, 2; QUI-
 ETING TITLE, 5, 6, 9; RAILROAD, 2, 11, 14; SCHOOL SUPERINTENDENT,
 2 to 4; SUPREME COURT, 1 to 3, 6 to 8, 11, 13, 15; VENDOR AND VEN-
 DEE, 9 to 14; WILLS, 11; WITNESS.

1. *Records.*—Parol evidence of the contents of a public record is inadmis-
 sible. *Hamilton v. Shoaff, 63*
2. *Same.*—The contents of a book kept in another State, called a "trans-

- fer book," not shown to be a public record, are not admissible in evidence against one who did not make the entries therein. *Id.*
3. *Same.—Swamp Lands.—Judicial Knowledge.—Title.*—Courts take judicial knowledge of the act of Congress of September 28th, 1850, granting swamp lands to the States, and a patent for such lands from the United States to the State of Iowa, dated in 1869, is sufficient proof of title in that State at the date of the act of Congress. *Id.*
 4. *Same.—Deed.—Breach of Covenant.—Seizin.*—In a suit for breach of covenant of seizin in a deed, the plaintiff by his evidence showed a chain of deeds beginning with one from K., made in 1868, and extending to the defendant, and then title in the State of Iowa granted by the United States in 1850.
- Held*, that title in the State of Iowa in 1850 was not inconsistent with title in K. in 1868, and, therefore, this evidence failed to show a breach of the covenant, the burden of which, under an answer of general denial, was on the plaintiff. *Id.*
5. *Lost Writing.—Immateriality.*—Where a writing, which would be proper evidence, is shown to be lost, parol proof of its contents is admissible, and if the evidence be immaterial it is necessarily harmless.
Langedale v. Woolen, 575
 6. *Deed.—Mortgage.—Witness.—Declarations of Party in Possession.—Vendor and Vendee.*—In ejectment by the grantee against the heirs of the grantor, it was in question whether the deed was intended as a mortgage. It was in proof that the grantor remained in possession, erected buildings and insured them, and made other improvements.
- Held*, that the declarations of the grantor, while negotiating for said buildings, insurance, and while making improvements, concerning the acts so being done, were proper evidence for the defendants, so far as they tended to characterize such acts.
- Held*, also, that the grantee and his wife were not competent witnesses.
Creighton v. Hoppis, 369
7. *Evidence.—Rebutting.*—Evidence which controverts that of the defendant as to particular facts is proper in rebuttal, though the same evidence would also have been proper as part of the plaintiff's original case.
Bedford, etc., R. R. Co. v. Rainbolt, 551

EXCEPTIONS.

See INSTRUCTIONS TO JURY, 1; PRACTICE, 10; RECEIVER, 1; SPECIAL FINDING; SUPREME COURT, 2, 9, 12.

EXCHANGE.

See BAILMENT.

EXECUTION.

See FRAUDULENT CONVEYANCE, 1; JUDGMENT, 2; PARTIES; PARTNERSHIP, 1, 2.

1. *Lien.—Personal Property.—Chattel Mortgage.*—A writ of *vendi. exponas*, with a command to make any part of the judgment unsatisfied by the property mentioned in the writ, by levy on any other property of the defendant, is a lien from its receipt by the sheriff upon personal property of the defendant, subject to execution, within the county, prior to a chattel mortgage thereon afterwards executed. *Durbin v. Haines, 463*
2. *Same.—Exemption.*—An execution in the hands of a sheriff is not a lien where the defendant has no property save what he may claim as exempt from execution by schedule. *Id.*
3. *Sale of Mortgaged Chattels.—Possession.*—Under the statute mortgaged chattels may be levied upon and sold, subject to the mortgage, to satisfy an execution against the mortgagor. The officer is entitled to

possession of such chattels, as against the mortgagee, for the purpose of making the sale. *Poster v. Bringham, 505*

4. *Sale in Parcels.—Enforcement of Lien Against Parcels.—Rule in Equity.—Sheriff's Duty.*—Where real estate, which is subject to the lien of a judgment, is sold and conveyed in parcels to different purchasers at different times, and afterwards an execution is sued out for the enforcement of such judgment lien, it is the duty of the proper sheriff, in analogy to the rule in equity in like cases, to offer for sale the several parcels of such real estate, in the inverse order in which the same had been previously sold and conveyed; and where this has been done, and there has been no sale for the want of bidders, and the execution remains unsatisfied, it then becomes the duty of the sheriff to offer and sell, if he can, the parcel of such real estate first sold and conveyed, and the sale thus made by the sheriff is legal and valid.

Ritter v. Cost, 80

EXEMPTION.

See EXECUTION, 2; PARTNERSHIP, 1, 2.

EXHIBIT.

See CITY, 2; DRAINAGE, 1, 5; PLEADING, 6.

FENCE.

See NEGLIGENCE, 6, 7; RAILROAD, 3 to 11.

FINDING.

See CITY, 10; NEGLIGENCE, 2; NEW TRIAL, 2, 3; PARTITION, 7; PRACTICE, 2, 7, 10; SPECIAL FINDING; SUPREME COURT, 16.

FIXTURES.

See MORTGAGE, 8.

FORECLOSURE.

See COUNTY AUDITOR; HUSBAND AND WIFE, 1; MORTGAGE; PRINCIPAL AND SURETY; TAXES, 4, 12; VENDOR AND VENDEE, 7.

FORMER ADJUDICATION.

See JUDGMENT, 4, 6; PARTITION, 7; VENDOR'S LIEN, 4.

FORMER CONVICTION.

See CRIMINAL LAW, 15, 16.

FRAUD.

See DIVORCE, 3; FRAUDULENT CONVEYANCE; JUDGMENT, 6; MORTGAGE, 5; SALE; STATUTE OF FRAUDS; TRUST AND TRUSTEE.

FRAUDULENT CONVEYANCE.

See DIVORCE, 3; TRUST AND TRUSTEE.

1. *Complaint to Set Aside Deed by Judgment Creditor.—Quieting Title.—Trial.—Causes in Equity.—Jury.*—A complaint by a judgment creditor to set aside conveyances of real estate as fraudulent, and subject some of the lands to execution upon the judgment, and quiet the plaintiff's title to some of them already purchased on execution, presents a cause in equity triable by the court under the statute, R. S. 1881, section 409. *Müller v. Evansville Nat'l Bank, 272*
2. *Same.—New Trial as of Right.*—Where the complaint seeks to annul a deed as fraudulent, and to quiet the plaintiff's title as against it, and the defendant by counter-claim claims title to the same lands by virtue of that deed, and seeks to quiet his title, the defendant, if the finding be against him generally, is entitled to a new trial as of right under the statute, R. S. 1881, section 1064. *Id.*

3. *Assumpsit.—Trial.—Jury.—Equity.*—Where a complaint, as in assumpsit, is to recover a sum of money, and also to subject certain lands fraudulently conveyed to the payment of the judgment, the latter branch of the case is not, under section 409, R. S. 1881, triable by jury, and such a trial is fatal error. *Lake v. Lake, 339*
4. *Evidence.—Transfer to Bank.—Husband and Wife.*—In an action to set aside certain conveyances as fraudulent, made by an insolvent debtor to a bank in payment of credits due the bank, as was claimed, evidence that such debtor's wife then held \$37,700 of the stock of such bank in trust for him, has a tendency to show that such transfer was fraudulent as against other creditors. *Fitch v. First Nat'l Bank, 443*
5. *Same.*—The fact that a large amount of property, consisting of town lots, saw-mill, saw-logs, lumber and other personal property, was conveyed by an insolvent debtor to such bank in payment of credits claimed to be due, without inventory, measurement or count, furnishes some evidence that such transfer was fraudulent as against other creditors. *Ib.*
6. *Same.*—Where the cashier of such bank is cognizant that the transfer of such property will inure to the benefit of one of such debtors by enhancing the value of the stock held by his wife in trust for him, and that such excess is thus placed beyond the reach of other creditors of such debtors, these facts, in connection with the fact that such cashier knows that such debtors are insolvent, furnish some evidence that said bank participated in the alleged fraudulent intent of such debtors. *Ib.*
7. *Same.—Estoppel.*—The fact that one of the creditors who instituted the action had obtained a judgment, and had levied upon one of the pieces of real estate that had been transferred, did not preclude him from maintaining the action. *Ib.*
8. *Same.—Weight of Evidence.*—Where the evidence in such case tends to support the finding, the Supreme Court will not disturb it. *Ib.*

GAMING.

See CRIMINAL LAW, 23, 24.

GROWING CROPS.

See EJECTMENT, 3; RECEIVER, 2.

GUARDIAN AND WARD.

See PARTITION, 4 to 6.

GUARDIAN'S SALE.

See PARTITION, 4 to 9.

HABEAS CORPUS.

Practice.—Where exceptions are sustained to the return to a writ of *habeas corpus*, and no further return is made, the verified petition for the writ showing facts sufficient, the prisoner may be discharged from restraint without further evidence. *Joab v. Sheets, 328*

HARMLESS ERROR.

See COUNTY TREASURER, 4, 5; DEPOSITION; ELECTIONS, 2; EVIDENCE, 5; INSTRUCTIONS TO JURY, 2, 7; INTERROGATORIES TO JURY, 2; PRACTICE, 2, 6, 11, 16 to 18, 21; PRINCIPAL AND SURETY; SUPREME COURT, 16.

HEIRS.

See DECEDENTS' ESTATES, 2; DEED, 4, 5; VENDOR'S LIEN, 4; WILLS, 3, 7, 8.

HIGHWAY.

See RAILROAD, 3 to 7.

Dedication.—Dedication of land to public use as a highway may be inferred from public use thereof as such for nineteen years, with the consent of the owner, together with his acts and declarations explanatory of his intention, and surrounding circumstances. *Carr v. Kobb, 53*

HUSBAND AND WIFE.

See DEED, 5; DIVORCE; EVIDENCE, 6; FRAUDULENT CONVEYANCE, 4; INSURANCE; MARRIED WOMAN; MORTGAGE, 3; TRESPASS.

1. *Tenants by Entireties.*—*Judgment.*—*Foreclosure of Lien.*—A judgment foreclosing a lien against lands held by husband and wife as tenants by entireties, is not necessarily void; it would be valid if both were parties thereto. *Barren Creek, etc., Co. v. Beck, 247*
2. *Trust and Trustee.*—*Conversations.*—*Evidence.*—In a suit by a widow against a purchaser of lands upon execution against her deceased husband, in which she claims that her husband held the lands in trust for her, she can not testify to conversations with him during life touching the matter. *Hyland v. Milner, 308*
3. *Abandonment.*—*Liability for Wife's Necessaries.*—A husband who abandons his wife, without her fault, and leaves her for a period of months wholly without means of support, is liable to her son who provides for her necessaries during that time, without any express request or promise of the husband to pay therefor. *Eiler v. Crull, 375*
4. *Contract.*—*Breach.*—*Measure of Damages.*—*Mortgage.*—Suit by a married woman, alleging that she had, at the instance of her husband and the defendant, mortgaged her lands to secure a loan of \$3,000, upon an agreement with the defendant that he would receive the money and apply \$1,000 of it in payment of an older mortgage on part of the same lands, given to secure her husband's debt, and would pay \$2,000 to her husband; and for breach, that the defendant received the money, did not apply said \$1,000 as agreed, but converted it to his own use, by reason whereof she lost her land. It appeared in evidence that \$300 had been paid by her husband upon the older mortgage. *Held*, that the measure of damages could not exceed \$700 and the interest thereon. *Sharpe v. Graydon, 232*
5. *Same.*—*Evidence.*—In such case it is error to exclude evidence by the husband as a witness to the effect that the loan was made with a view to other purposes than the payment of the prior mortgage; so, also, to exclude evidence showing that the husband, and not the defendant, nine years before the trial, received the borrowed money, and that he disposed of the whole of it, paying \$300 on the older mortgage. *Id.*
6. *Married Woman.*—*Can not Mortgage her Real Estate for Husband's Debt.*—Since the act of April 16th, 1881, went into force, a married woman can not execute a binding mortgage upon her real estate to secure her husband's debt. *Allen v. Davis, 216*

IDENTITY.

See PARTITION, 9.

INDICTMENT.

See CRIMINAL LAW, 1.

INFANT.

See INTOXICATING LIQUOR, 2, 3; MARRIED WOMAN, 3, 4.

1. *Deed.*—*Delivery.*—A deed of an infant, signed and acknowledged, and placed in the hands of another for delivery, but not actually delivered until full age, is not voidable for infancy. *Sims v. Smith, 469*
2. *Same.*—*Quieting Title.*—*Complaint.*—A complaint to quiet title, alleging that the defendant who was once seized of the land gives out in public speeches falsely, that her conveyance thereof was made when she was

an infant, and that she was still the owner, whereby the plaintiff's title was clouded, is good on demurrer. *Ib.*

3. *Same.—Married Woman.—Evidence.*—Upon a complaint to quiet title, alleging the facts to be that the plaintiff, a married woman, was seized of the land and executed a conveyance thereof while an infant, in which her husband joined, and that she had disaffirmed the deed, is not supported by proof that the deed was ineffectual for want of such a certificate of acknowledgment as the statute required to give validity to the deed of a married woman. *Ib.*

INJUNCTION.

See CITY, 2 to 5; JUSTICE OF THE PEACE; WATERCOURSE.

INSANITY.

See WILLS, 10.

INSOLVENCY.

See DEED, 4; FRAUDULENT CONVEYANCE; JUDGMENT, 2; RECEIVER, 2; SALE; VENDOR'S LIEN, 2.

INSTRUCTIONS TO JURY.

See CRIMINAL LAW, 3, 11, 18 to 20, 22; INTOXICATING LIQUOR, 2; MALICIOUS PROSECUTION; QUIETING TITLE, 2, 3; RAILROAD, 15; SCHOOL SUPERINTENDENT, 4, 5; VENDOR AND VENDEE, 8.

1. *Exceptions.*—Where instructions are objected to solely upon the ground that they do not fully state the law on the subject-matter thereof, it is incumbent on the objecting party to ask the trial court for additional instructions covering the omitted points, for, in such a case, the mere saving of an exception to the instruction given will not constitute an available error for the reversal of the judgment.

Fitzgerald v. Goff, 28

2. *Harmless Error.*—The refusal of instructions, the substance of which is embraced in others given, is a harmless error. *State v. Sutton, 300*

3. *Same.—Not Signed.*—The refusal of instructions, not signed by the party or his attorney asking them, is a harmless error. *Ib.*

4. *Same.—Contradictory.*—When the instructions are contradictory, etc., and tend to mislead the jury, the judgment will be reversed. *Ib.*

5. It is not error to refuse an instruction which has been substantially given in another form. *Davidson v. State, 366*

6. *Invading Province of Jury.*—It is error to instruct the jury in the language of 1 Greenl. Ev., sec. 200, expressing the necessity of caution as to evidence of admissions of parties, and the reasons for such caution, as that author gives them, because it invades the province of the jury as to matters of which the jurors are the exclusive judges.

Lewis v. Christie, 377

7. *Same.—Harmless Error.*—An instruction against a defendant, which is erroneous, will not be held harmless merely because his answer was bad. *Ib.*

8. *Refusal of Instructions.—Error.*—There is no available error in the court's refusal to give an instruction, when the record shows that the substance and law of such instruction had been given the jury in the court's own instructions, nor where the instruction refused gave undue prominence to an isolated question in the cause, upon which the defendant's guilt or innocence of the offence charged did not necessarily depend. *Wachstetter v. State, 290*

9. *Instructions.—Supreme Court.*—The rule that the instructions in a case are all to be taken together, and that if they thus present the law cor-

rectly and without material contradiction, they will be sustained by the Supreme Court, applies as well to criminal prosecutions as to civil actions. *Story v. State, 413*

INSURANCE.

1. *Life Insurance.—Assignment of Policy.—Married Woman.*—A life policy upon the life of the husband taken by him payable to his wife or her assigns is a chose in action, her property, and may be assigned by her, if the law of her domicile, as in Illinois, authorizes her to sell and convey her property, and in such case upon the death of the husband the assignee is entitled to the proceeds according to the terms of the assignment. *Damron v. Penn, etc., Ins. Co., 478*
2. *Same.—Agreement.—Statute of Limitations.*—Where such assignment is made to secure a debt of the husband, upon agreement that no proceedings shall be taken to enforce collection thereof during the husband's life, the statute of limitations does not commence to run against the debt so secured from the assignment, until his death. *Ib.*

INTENTION.

See DEED, 1 to 5; WILLS, 4 to 8.

INTERROGATORIES TO JURY.

See CITY, 10; DECEDENTS' ESTATES, 3; PRACTICE, 7; SUPREME COURT, 10; VERDICT, 2.

1. *Submission.—General Verdict.*—Answers by the jury to interrogatories, where it does not appear by the record that the interrogatories had been, by the court, submitted to the jury, can not override a general verdict. *Hamilton v. Shoaff, 63*
2. *Same.—Harmless Error.*—To refuse to send interrogatories to the jury, answers to which could not overrule or antagonize a general verdict, is a harmless error. *Ib.*

INTOXICATING LIQUOR.

1. *Sale by Druggist on Sunday.*—A druggist is liable to fine for selling liquor on Sunday to a person without a physician's prescription, although the liquor may be purchased and used for medicinal purposes, and this fact is known to the druggist at the time of the sale. *Barton v. State, 89*
2. *Selling to Minor.—Excuse.—Burden of Proof.—Instructions.*—One who sells liquor to an infant has the burden of showing an excuse therefor; and an instruction that if the appearance of the infant indicated that he was of full age, and he had so stated to the accused, the latter is excusable, is not correct. *Swigart v. State, 111*
3. *Sale of Intoxicating Liquor to Minor. Evidence.*—Where evidence is given on the trial, on May 1st, 1884, of a defendant charged with a sale and giving away of intoxicating liquor to a minor, that the prosecuting witness "will be twenty-one years old the first day of August next," the court is justified in finding from the evidence that on the 15th day of November, preceding the day of trial, the witness was under twenty-one years of age. *Dolke v. State, 229*

ISSUE.

See INTOXICATING LIQUOR, 2; QUIETING TITLE, 1; RAILROAD, 6; REPLEVIN, 1.

JEOPARDY.

See CRIMINAL LAW, 9.

JUDGE.

Mandamus.—Signing Bill of Exceptions by Judge after Time Limited.—Absence from State.—Diligence.—A writ of mandate will not be awarded against a judge to compel him to sign a bill of exceptions after the

time limited, where he was absent from the State when the time expired, if the applicant for the writ fails to show proper diligence in presenting the bill for signing after his return. An unexplained delay of fifty days shows want of diligence. *State, ex rel., v. Dyer, 426*

JUDGMENT.

See CRIMINAL LAW, 14; HUSBAND AND WIFE, 1; JUSTICE OF THE PEACE; MORTGAGE, 1; PARTITION, 7; PRINCIPAL AND SURETY; PROMISSORY NOTE, 1; REFLEVIN, 2; SPECIAL FINDING, 2; SUBROGATION; SUPREME COURT, 4, 9; TAXES, 12; VENDOR AND VENDEE, 1, 2; VENDOR'S LIEN, 2, 4.

1. *Redemption*.—Where one obtains a decree allowing him to redeem from a mortgage within a given time if a certain event shall transpire, the decree binds him, and he can not avoid its effect by a subsequent suit for that purpose, upon the ground that the contingency did not happen, and hence redemption under the decree became impossible.

Kolle v. Clausheide, 97

2. *Assignment*.—*Principal and Surety*.—*Notice by Assignment*.—*Contemporaneous Agreement to first Exhaust one Defendant*.—*Lien*.—*Insolvency*.—*Execution*.—*Release*.—*Pleading*.—To a suit by the assignee upon a joint judgment against S. and M. and others, an answer by M., that in the original suit he appeared and in good faith pleaded a valid defence, stating it, and that in consideration of his withdrawing his defence and making default, which thereupon he did, then plaintiff agreed in writing to first exhaust the property of S., who, as between S. and M. was the principal debtor; that so the judgment was suffered, and an execution was issued with direction by the plaintiff to levy upon S.'s property, of which he had abundance upon which the execution was a lien; that no levy was made, the execution was returned, the lien lost, and S. has since become insolvent, of all which the present plaintiff had knowledge, is good on demurrer, and a reply thereto that S. remained solvent long after the return of the execution is bad.

Smith v. McKean, 101

3. *Lien*.—*Sheriff's Sale*.—A judgment lien upon lands is not divested by sale and conveyance of the lands, and a purchaser at sheriff's sale upon execution to satisfy the judgment takes title, where it does not appear that the debtor had other property which should have been first exhausted.

Brooker v. Sprague, 169

4. *Former Adjudication*.—*Party to Decree*.—*Estoppel*.—*Title to Real Estate*.—A party to a decree in a former adjudication between the same parties, in relation to the same subject-matter, is bound and concluded by each provision of the decree, and can not acquire any title to or interest in the real estate, which was the subject of the former adjudication, except by a substantial compliance with all the provisions of such decree.

McCaslin v. State, ex rel., 428

5. *Application to Set Aside*.—*Complaint*.—*Defects Cured*.—In the absence of a demurrer or a motion to make more specific, a complaint to set aside a judgment rendered by default, which fails to allege the date thereof any more definitely than that it was "on the — of —, 1882," will be deemed cured after a finding.

Overton v. Rogers, 595

6. *Same*.—*Fraud*.—*Former Adjudication*.—*Negligence*.—An adjudication of a motion to set aside a judgment rendered by default, on the ground of excusable neglect, is not a bar to a subsequent action to set aside such judgment for fraud, even if the plaintiff had knowledge of the fraud when his motion was made.

Id.

7. *Same*.—*Variance*.—Where a complaint to set aside a judgment alleges a judgment by default for three thousand dollars, and the proof shows

it to be three thousand five hundred dollars, the variance is not material. *Ib.*

8. *Husband and Wife.—Tenants by Entireties.—Foreclosure of Lien.*—A judgment foreclosing a lien against lands held by husband and wife as tenants by entireties, is not necessarily void; it would be valid if both were parties thereto. *Barren Creek, etc., Co. v. Beck, 247*

JUDICIAL KNOWLEDGE.

See DRAINAGE, 2; EVIDENCE, 3; NEW TRIAL, 5; PARTITION, 2.

JUDICIAL SALE.

See JUDGMENT, 3; MORTGAGE, 2; PARTITION, 4 to 9.

JURISDICTION.

See AGREED CASE, 3; CITY, 3; COURTS, 1; DRAINAGE, 1.

JURY.

See CRIMINAL LAW, 9, 17, 18; FRAUDULENT CONVEYANCE, 1, 3; INSTRUCTIONS TO JURY, 6; PARTNERSHIP, 3; PRACTICE, 8 to 11; QUIETING TITLE, 8; RAILROAD, 17.

Misconduct of.—Bailiff's Presence in Jury-Room.—Counter-Affidavits.—Supreme Court.—The unexplained and unnecessary presence of the bailiff of the jury in their room, during their deliberations, is good cause for a new trial, as constituting misconduct of the jury; but where it is shown by counter-affidavits, and the trial court decides, that the presence of the bailiff in the jury-room was necessary to the proper discharge of his duties as bailiff, and did not harm the complaining party, the Supreme Court will not disturb such decision on the weight of the evidence. *Fitzgerald v. Goff, 28*

JUSTICE OF THE PEACE.

Judgment.—Injunction.—The right of a justice of the peace, acting under color of appointment, to fill a vacancy, can not be questioned by a suit to enjoin the collection of a judgment by him rendered.

Baker v. Wambaugh, 312

LACHES.

See CITY, 5; SCHOOL SUPERINTENDENT, 5.

LANDLORD AND TENANT.

See EJECTMENT, 1; VENDOR AND VENDEE, 3, 14.

LIEN.

See EXECUTION, 1, 2, 4; HUSBAND AND WIFE; JUDGMENT, 2, 3, 8; PARTITION, 7; TAXES, 4 to 9, 11; VENDOR AND VENDEE, 1, 2, 6 to 14; VENDOR'S LIEN.

LIFE-ESTATE.

See WILLS, 8.

LIFE INSURANCE.

See INSURANCE.

MALICIOUS PROSECUTION.

1. *Complaint.*—In a complaint for malicious prosecution, the want of probable cause is properly shown by general averment of the fact, and it is not necessary or proper to allege the evidence of the fact. *Benson v. Bacon, 156*
2. *Same.—Probable Cause.—Instruction.*—In such case an instruction that if the prosecution alleged was not set on foot for a public purpose, then there was no probable cause, is erroneous. *Ib.*

MANDAMUS.

See CORPORATION, 1; JUDGE.

MANSLAUGHTER.

See CRIMINAL LAW, 1.

MARRIAGE.

1. *Marriage Contract.—Statute of Frauds.*—A simple contract of marriage is not within the statute of frauds, and hence need not be in writing.
Caylor v. Roe, 1
2. *Same.—Antenuptial Contract.*—Antenuptial contracts, in consideration of marriage, or in relation to real estate, are within the statute of frauds, and must be in writing to be enforced. *Ib.*
3. *Same.*—There can be no recovery for the breach of a contract, if any portion of it is within the statute of frauds. *Ib.*
4. *Same.*—At the time of entering into a verbal contract of marriage, and as the condition upon which it was entered into, and in consideration of the contemplated marriage, the parties orally agreed that in lieu of the interest in his estate which she would have as his wife, she should accept certain real estate and \$1,000, which contract he agreed to have reduced to writing, and submitted for her approval and signature before the marriage.

Held, that the agreement constituted one entire contract, the portion in relation to the marriage settlement being a condition, and that, as the contract was not in writing, no action can be maintained upon it. *Ib.*

MARRIED WOMAN.

See CONTRACT; HUSBAND AND WIFE; INSURANCE; MORTGAGE, 3;
TRESPASS.

1. *Can not Mortgage her Real Estate for Husband's Debt.*—Since the act of April 16th, 1881, went into force, a married woman can not execute a binding mortgage upon her real estate to secure her husband's debt.
Allen v. Davis, 216
2. *Quieting Title.—Evidence.*—Upon a complaint to quiet title, alleging the facts to be that the plaintiff, a married woman, was seized of the land and executed a conveyance thereof while an infant, in which her husband joined, and that she had disaffirmed the deed, is not supported by proof that the deed was ineffectual for want of such a certificate of acknowledgment as the statute required to give validity to the deed of a married woman.
Sims v. Smith, 469
3. *Same.—Infant.—Deed.—Disaffirmance.*—If a married woman, while an infant, signs and acknowledges with her husband a deed for her real estate and authorizes him to deliver it, and he delivered it with her consent after she became an adult, it can not afterwards be avoided by her on account of infancy. *Ib.*
4. *Same.—Husband as Agent.*—A husband may act as the agent of his wife, and such agency may be conferred before he acts, or his acts may be subsequently ratified by her. *Ib.*

MASTER AND SERVANT.

See NEGLIGENCE, 5.

MASTER COMMISSIONER.

See PRACTICE, 12 to 14.

MEASURE OF DAMAGES.

See CONTRACT, 1.

MECHANIC'S LIEN.

Evidence.—Supreme Court.—For an example of evidence regarded by the Supreme Court as “fairly tending” to support a verdict for the enforcement of a mechanic's lien, and sufficient to support it in the Supreme Court, see *Cannon v. Helfrick*, 164

MERGER.

See PROMISSORY NOTE, 1; TAXES, 12.

MINOR.

See INFANT; INTOXICATING LIQUOR, 2, 3.

MISNOMER.

See ATTACHMENT; TAXES, 5.

MISPRISION.

See DEPOSITION, 1.

MISTAKE.

See DEPOSITION, 1; TAXES, 11.

MONEY HAD AND RECEIVED.

See BANKRUPTCY.

MORTGAGE.

See BAILMENT; CONTRACT; COUNTY AUDITOR; DEED, 5; EVIDENCE, 6; EXECUTION; HUSBAND AND WIFE, 6; JUDGMENT, 1; MARRIED WOMAN, 1; SUBROGATION; TAXES, 4, 12, 13; VENDOR AND VENDEE, 7.

1. *Foreclosure.—Parties.—Judgment.*—A decree of foreclosure is a nullity as to one of several owners of the equity of redemption who was not a party thereto, and is no bar to another suit against him to foreclose. *Curtis v. Gooding*, 45
2. *Same.—Subrogation.—Purchaser at Sheriff's Sale.*—If, in such case, there has been a sale under the decree, the holder of the sheriff's certificate of sale is by subrogation the real party in interest, and he alone can maintain the second suit. *Ib.*
3. *Same.—Husband and Wife.—Tenants by Entireties.*—If such second suit be against a married woman, holding with her husband as tenants by entireties, the husband also is a proper defendant. *Ib.*
4. *Description of Lands.—Complaint.—Foreclosure.*—A mortgage of lands described as “all the lands owned by the mortgagor” can be made certain by evidence *aliunde*, and therefore is not void; and a complaint to foreclose, describing the lands specifically, and averring that these were all the lands owned by the mortgagor, is, in that respect, sufficient. *Leslie v. Merrick*, 180
5. *Execution.—Fraud.*—One who, being illiterate, executes a mortgage without knowledge of its contents, no fraud being shown, can not contest its validity on that ground, nor can his grantee who purchases with knowledge of the mortgage. *Ib.*
6. *Foreclosure.—Receiver.—Practice.*—In a suit to foreclose a mortgage, a receiver is appointed on motion or petition therefor, and on such application the complaint can not be questioned by demurrer or otherwise. The application may be heard on affidavits or oral testimony, and much in the discretion of the court, and an exception to granting or refusing the motion saves the question for appeal; and erroneous statements in such affidavits may be corrected by additional affidavits. *Hursh v. Hursh*, 500

7. *Same.—Statute Construed.*—The statute, R. S. 1881, section 1222, warrants the appointment of a receiver in a suit to foreclose a mortgage, without reference to the solvency of the mortgagor, when it appears that the mortgaged property is not sufficient to satisfy the debt, and he may be authorized to take possession of the land and crops growing thereon, though the mortgagor be at the time in possession. *Id.*
8. *Fixtures.—Mortgage.—Foreclosure.—Purchaser.—Agreement.*—The owner of real estate with a flouring mill thereon, which was subject to a mortgage duly recorded, procured new machinery therefor on credit, upon agreement that title to the machinery should not pass until it was paid for. The machinery was attached to the realty as was intended.
- Held*, that a purchaser upon foreclosure took title to the machinery as against the vendor of it, notwithstanding the contract and a failure to pay for it. *Bas Foundry, etc., Works v. Gallentine, 525*
9. *Subrogation.—Agreement.—Foreclosure.*—W., owning a lot subject to a mortgage duly recorded, conveyed a part thereof to B., in consideration in part of the oral agreement of B. that he would pay the mortgage. W. afterwards conveyed the remainder of the lot, for value and with warranty, to C., to whom B. at the time affirmed his said promise. C., for value, conveyed said remainder to D., informing the latter of B.'s agreement. Afterwards D., in order to save the lot from sale, was compelled to pay the mortgage.
- Held*, that B. was personally liable to D. for the amount paid, and to a decree of foreclosure against B.'s part of the lot, to make the same. *Wright v. Briggs, 563*

MUNICIPAL CORPORATION.

See CITY.

MUTUUM.

See BAILMENT.

NAME.

See ASSIGNMENT OF ERROR, 4; ATTACHMENT; PARTITION, 8; TAXES, 5.

NECESSARIES.

See HUSBAND AND WIFE, 3.

NEGLIGENCE.

See CITY, 1, 5; JUDGMENT, 6; RAILROAD, 9 to 11, 13 to 15.

1. *Question of Law.*—The facts being found, negligence is a pure question of law to be decided by the court. *Indianapolis v. Cook, 10*
2. *Same.—Verdict.—Special Finding of Facts.—Cities.—Street.—Sidewalk.*—Suit against a city for injury in consequence of an obstruction in a sidewalk. Answering interrogatories, the jury found the obstruction to have been a water-box 6 by 7½ inches, and 1½ inches above the level of the sidewalk; that the plaintiff had knowledge of it. The plaintiff, in the dark when it was difficult to see it, stumbled over it and was injured.
- Held*, that the defendant should have judgment, notwithstanding an adverse general verdict. *Id.*
3. *Proximate Cause.—Fire.*—Where A. negligently, but accidentally, sets his own building on fire, and while it is burning the fire is, by force of the wind, carried to B.'s building, which is thereby destroyed, A. is not liable to B., the wind being an independent intervening cause, and, therefore, A.'s negligence is not the proximate cause of the injury. *Penn. Co. v. Whitlock, 16*

4. *City.—Sidewalk.—Evidence.*—In a suit against a city for an injury received in consequence of an obstruction upon a sidewalk, evidence that others had passed over it without injury is not admissible; nor is evidence that the plank crossing, which was the obstruction, was not different from the generality of crossings of like character in the city.
Bauer v. Indianapolis, 56
5. *Employer and Employee.*—An employer is liable to an employee for a personal injury resulting from a failure to provide proper machinery, or from the employment of incompetent servants.
Nordyke, etc., Co. v. Van Sant, 188
6. *Pleading.*—A complaint by a turnpike company against an adjoining land-owner for negligently constructing his fence across a stream, so that it obstructed the water, etc., whereby plaintiff's bridge was destroyed, which fails to negative contributory negligence by the plaintiff, is bad on demurrer.
Stevens v. Lafayette, etc., G. R. Co., 392
7. *Same.—Evidence.*—It is error in such case, where the general denial is pleaded, to refuse evidence for the defendant showing that his fence was built in the best manner to avoid injury to the bridge; but evidence that he offered to repair or reconstruct the bridge is not admissible.
Id.

NEW TRIAL.

See PRACTICE, 7; SPECIAL FINDING, 1, 2; SUPREME COURT, 7; VENDOR AND VENDEE, 5.

1. *Demurrer to Evidence.*—That a demurrer to the evidence was improperly overruled is not a cause for new trial. *Wabash, etc., R. W. Co. v. Nice*, 152
2. *Special Findings.—Practice.*—Where the court finds the facts specially with its conclusions of law, matters not in issue, or which, in view of the facts found, are immaterial, need not be found, and the omission to find them is not cause for a new trial.
Shelbyville, etc., T. P. Co. v. Green, 205
3. *New Trial as of Right.*—Where the complaint seeks to annul a deed as fraudulent, and to quiet the plaintiff's title as against it, and the defendant by counter-claim claims title to the same lands by virtue of that deed, and seeks to quiet his title, the defendant, if the finding be against him generally, is entitled to a new trial as of right under the statute, R. S. 1881, section 1064. *Miller v. Evansville Nat'l Bk.*, 272
4. *Partition.—Quieting Title.—New Trial as of Right.*—In an action for partition, where the defendant files a cross-complaint to quiet his title to the whole land, and judgment is rendered against him, he is entitled to a new trial as a matter of right under the statute.
Hammann v. Mink, 279
5. *Same.—Payment of Costs to Clerk in Silver.—Judicial Knowledge.*—In such case the payment of costs may be made in silver, and where they are thus paid to a person who is clerk of the court, the party seeking the new trial need not prove that such person was the clerk, as the court takes judicial notice of its own officers.
Id.

NOTICE.

See JUDGMENT, 2; SUPREME COURT, 14; VENDOR AND VENDEE, 1.

OFFICE AND OFFICER.

See CITY, 3 to 9; CORPORATION, 1; COUNTY AUDITOR; COUNTY TREASURER; DEPOSITION, 1; DRAINAGE, 4; EJECTMENT, 2; JURY; JUSTICE OF THE PEACE; NEW TRIAL, 5; PROSECUTING ATTORNEY; SCHOOL SUPERINTENDENT.

OFFICIAL BOND.

See COUNTY AUDITOR; COUNTY TREASURER.

OWNERSHIP.

See BAILMENT.

PARENT AND CHILD.

See DIVORCE, 1.

PARTIES.

See ASSIGNMENT OF ERROR, 4, 5; ATTACHMENT; DIVORCE, 3; HUSBAND AND WIFE, 1; JUDGMENT, 4; MORTGAGE, 1, 3; PLEADING, 1; PRACTICE, 4; REPLEVIN, 1; VENDOR'S LIEN, 3, 4.

Suit on Replevin Bond.—Waiver.—Where a replevin bond is executed to a sheriff and execution plaintiff jointly, and an action thereon is subsequently brought by the execution plaintiff alone, the defect of plaintiffs will be waived by the failure of defendants to demur therefor.

Foster v. Bringham, 505

PARTITION.

1. *Quieting Title.—New Trial as of Right.*—In an action for partition, where the defendant files a cross complaint to quiet his title to the whole land, and judgment is rendered against him, he is entitled to a new trial as a matter of right under the statute. *Hannmann v. Mink, 279*
2. *Same.—Payment of Costs to Clerk in Silver.—Judicial Knowledge.*—In such case the payment of costs may be made in silver, and where they are thus paid to a person who is clerk of the court, the party seeking the new trial need not prove that such person was the clerk, as the court takes judicial notice of its own officers. *Ib.*
3. *Same.*—The clerk of the court has authority to receive costs, and a payment to him is sufficient. *Ib.*
4. *Same.—Title by Guardian's Sale.—Order of Court.*—In such case, where the defendant claims the interest of the plaintiff under a guardian's sale, and the fact is found that such sale was made under the order of the court, was reported to and confirmed by the court, such confirmation, though irregularities intervened, renders the sale valid. *Ib.*
5. *Same.—Guardian's Deed.—Confirmation.*—A deed made by the guardian to the purchaser before the sale is confirmed is invalid, and does not convey the title, but where such deed is afterwards reported to and approved by the court at the confirmation of the sale, the same is then effectual to convey the title. *Ib.*
6. *Same.—Form of Deed.*—The mere omission to insert in such deed the page of the order book where the order of such sale is entered, does not invalidate such deed. *Ib.*
7. *Same.—Judicial Sale.—Liens.—Former Adjudication.—Special Findings.—Conclusions of Law.*—Where the facts found also show that the defendant purchased the property for value, and without notice, under a judicial decree upon a lien thereon adjudged to be superior to the plaintiff's lien, such facts entitle him to judgment. The mere fact that some of the special findings are also blended with the conclusions of law stated, does not impair such findings of fact. *Ib.*
8. *Same.—Name.—Variance Between Report of Sale and Deed and Record.—Evidence.*—Where the name of the purchaser in the report of sale and in the deed differs from the name in the final record, the report of sale may be read in evidence for the purpose of showing to whom the sale was made. *Ib.*
9. *Same.—Identification of Report.*—Such report may be read without proof of its identification by an entry in the order book, as such report, found among the papers in the cause, is *prima facie* admissible. *Ib.*
10. *Pleading.—Practice.—Amendment.*—Upon the trial of an action for partition it is not error to permit the defendants, at the close of the evi-

dence, to amend their answer by the addition of words which contain no new fact, but merely modify the terms of the prayer.

Retting v. Newman, 424

PARTNERSHIP.

See ATTACHMENT.

1. *Partnership Property.—Exemption.—Individual Debt.*—One partner can not claim the partnership property, or any specific part thereof, as exempt from sale on an execution against him for his individual debt.
State, ex rel., v. Emmons, 452
2. *Same.—Assets and Liabilities Equal.—Suit against Sheriff.—Damages.*—Where, in such a case, the partner claims his interest in the partnership property as exempt from sale on the execution, and the sheriff allows such exemption and returns the writ unsatisfied, and where, in a suit against the sheriff and his sureties, by the execution plaintiffs, to recover damages for the sheriff's failure to levy upon and sell the partner's interest in the partnership property, the court finds that the assets and liabilities of the partnership were equal in amount, and that the partner's interest in such property was of no value, and renders judgment thereon, in favor of such execution plaintiffs, for merely nominal damages, there is no such error in the judgment as authorizes the reversal thereof. *Ib.*
3. *Accounting.—Trial by Jury.—Practice.*—Under the law as it stood prior to 1881, parties to a suit to settle partnership affairs were entitled to a trial by jury. *Redinbo v. Fretz, 458*

PAYMENT.

See COUNTY TREASURER, 2, 4; NEW TRIAL, 5; PARTITION, 2; TRUST AND TRUSTEE; VENDOR AND VENDEE, 6.

PERSONAL INJURY.

See CITY; RAILROAD, 12 to 15.

PERSONAL PROPERTY.

See BAILMENT; EXECUTION; INSURANCE; PARTNERSHIP, 1, 2; TAXES, 1 to 6; WILLS, 9.

PLEADING.

See ASSAULT AND BATTERY; ASSIGNMENT OF ERROR, 1; CITY, 2; COUNTY TREASURER, 3, 4; CRIMINAL LAW, 1; DIVORCE, 3; DRAINAGE, 1, 5; EJECTMENT; FRAUDULENT CONVEYANCE, 1; INFANT, 2, 3; JUDGMENT, 2, 5; MALICIOUS PROSECUTION; MORTGAGE, 4; NEGLIGENCE, 6, 7; PARTITION, 10; PRACTICE, 1 to 3, 6, 16 to 18, 20; PRINCIPAL AND SURETY; QUIETING TITLE, 1 to 4, 10, 11; REPLEVIN, 1; RAILROAD, 1, 10; STATUTE OF FRAUDS, 2; TAXES, 2, 11, 12; VENDOR'S LIEN, 1, 2; WATERCOURSE, 3.

1. *Real Party in Interest.*—The defence that the plaintiff is not the real party in interest must be specially pleaded. *Curtis v. Gooding, 45*
2. *Complaint.—Statement of Facts.—Legal Conclusions.*—It is error to overrule a demurrer to a paragraph of complaint, which, instead of a statement of facts, contains merely legal conclusions from facts, which are not alleged and are not apparent. *Logansport v. La Rose, 118*
3. *Complaint.—Defect Cured by Verdict.*—A complaint, defective for want of the averment of a fact which may be inferred by reasonable intentment, is cured by verdict. *Hedrick v. D. M. Osborne & Co., 143*
4. *Variance.—Amendment.*—A variance which could not mislead the opposite party requires no amendment to avoid it, and is wholly immaterial. *Ib.*
5. *Practice.—Amendment.*—Upon the trial of an action for partition it is

not error to permit the defendants, at the close of the evidence, to amend their answer by the addition of words which contain no new fact, but merely modify the terms of the prayer. *Kettig v. Newman*, 424

6. *Promissory Note.—Exhibit.—Defect not Cured by Verdict.*—Where a complaint on a promissory note does not set out such note, nor aver that a copy is filed with the pleading, it is bad on demurrer, and if objection is made by demurrer, the defect is not cured by verdict.

Rairden v. Winstanley, 600

POSSESSION.

See DEED, 5; EJECTMENT, 1; EXECUTION, 3; QUIETING TITLE, 10; RECEIVER, 2; TAXES, 13; VENDOR AND VENDEE, 3, 14.

PRACTICE.

See AGREED CASE; ASSIGNMENT OF ERROR; CITY, 10; COUNTY TREASURER, 4, 5; CRIMINAL LAW, 3, 7, 10 to 14; DEMURRER TO EVIDENCE; FRAUDULENT CONVEYANCE, 8; HABEAS CORPUS; INSTRUCTIONS TO JURY; INTERROGATORIES TO JURY; NEW TRIAL; PARTIES; PARTITION, 10; PARTNERSHIP, 3; PLEADING; RECEIVER; SPECIAL FINDING; SUPREME COURT; VENDOR AND VENDEE, 5; VERDICT; WITNESS.

1. *Signing Pleadings.*—Where there has been no motion before verdict to strike out or reject a pleading, because not subscribed by the party or his attorney, the defect will not be regarded on appeal.

Louisville, etc., R. W. Co. v. Peck, 68

2. *Harmless Error.*—Where the special finding of facts shows that a particular paragraph of answer was not true, the Supreme Court will not consider whether a demurrer to it was improperly overruled.

Smith v. McKean, 101

3. *Same.*—Where the facts averred in a paragraph of reply, demurred to, are provable under the general denial, which is also in, the demurrer can be sustained without available error.

Ib.

4. *Defect of Parties.—Waiver.*—That there is a defect of parties defendants is waived if objection be not made by demurrer.

Giles v. Canary, 116

5. *Trial by Court.—Taking Under Advisement.—Motion to Set Aside Finding.—Statute Construed.*—The requirement of section 551, R. S. 1881, that the court trying an issue shall not hold the matter under advisement more than 60 days, is directory, and a failure to obey it will not affect the determination when made afterwards.

Smith v. Uhler, 140

6. *Pleading.—Harmless Error.*—A judgment will not be reversed for erroneously overruling a motion to strike out part of a pleading.

Benson v. Bacon, 156

7. *New Trial.—Waiver.—Special Finding.—Verdict.*—A motion for a new trial is not a waiver of a motion for judgment on facts specially found in answer to interrogatories, notwithstanding the general verdict.

Ledlie v. Merrick, 180

8. *Amendment.—Reswearing Jury.*—An amendment of pleadings upon the trial, unless it appears that the issues were changed thereby, does not make it necessary to reswear the jury.

Rogers v. State, ex rel., 218

9. *Same.—Argument of Counsel.*—In a civil case the court may forbid the argument of a question of law before the jury, there being no controversy as to the facts upon which the question arises.

Ib.

10. *Special Finding.—Conclusions of Law.—Exceptions.*—Where the court, at the request of one or more of the parties, makes a special finding of the facts and states thereon its conclusions of law, and the party objecting thereto merely saves an exception to the conclusions of law, and does not move either for a new trial or for a *venire de novo*, on appeal he admits that the facts are fully and correctly found, and the

- error, if any, is predicated solely upon the court's application of the law to the facts so found. *Schindler v. Westover*, 395
11. *Harmless Error*.—The refusal of a trial by jury is not a harmless error, although upon a second trial under the code of 1881 the parties would not be entitled to a jury. *Redinbo v. Fretz*, 468
 12. *Same*.—*Reference to Master Commissioner*.—Where a party is thus entitled to a trial by jury, the court could not, over his objection and demand for a jury, refer the case to a master commissioner. *Ib.*
 13. *Same*.—The reference to the master being a part of the record without a bill of exceptions, the objection and exception to such reference is also a part of the record without a bill of exceptions. *Ib.*
 14. *Same*.—*Reference*.—*Written Consent of Parties*.—Under 1 R. S. 1876, p. 629, *et seq.*, the written consent of the parties to a reference to a master commissioner is not required, as in case of a reference to a referee under section 349, 2 R. S. 1876, p. 178. *Ib.*
 15. *Evidence*.—*Rebuttal*.—Evidence which controverts that of the defendant as to particular facts is proper in rebuttal, though the same evidence would also have been proper as part of the plaintiff's original case. *Bedford, etc., v. R. R. Co. v. Rainbolt*, 561
 16. *Bad Answer*.—*Overruling Demurrer*.—*Harmless Error*.—*Evidence*.—The overruling of a demurrer to a bad paragraph of answer is a harmless error, when the evidence is in the record and shows clearly and conclusively that the error did not affect the substantial rights of the plaintiff, and that notwithstanding such error "the merits of the cause have been fairly tried and determined in the court below." *Cooper v. Jackson*, 566
 17. *Harmless Error*.—*Pleading*.—Error in sustaining a demurrer to a paragraph of answer to one of several paragraphs of complaint is harmless, if the same issue was made upon another paragraph of the complaint, and upon trial was found against the defendant. *Langsdale v. Woolen*, 575
 18. *Same*.—It is harmless error to sustain a demurrer to a paragraph of answer, all the averments of which are provable under another issue made by the pleadings. *Ib.*
 19. *Same*.—*Rule of Court, Enforcement of*.—Where a rule of court forbidding the removal of papers from the files has been violated by an attorney in the cause, as to depositions, the court may strike out his motion to suppress parts thereof. *Ib.*
 20. *Same*.—*Amendment of Pleading*.—*Discretion*.—The trial court has much discretion in the matter of amending pleadings, and this is not abused by refusing an immaterial amendment. *Ib.*
 21. *Competency of Witness*.—*Evidence*.—*Harmless Error*.—If a witness be competent as to any matter in issue, there is no available error in overruling a general objection "that he is incompetent," and in any event, if he testify only to matters which are established by other evidence without conflict, the error, if any, is harmless. *Forbing v. Weber*, 588
 22. *Recalling Witness*.—No error is committed in refusing to allow a party to recall a witness to testify to a matter to which he has already testified. *Morehouse v. Heath*, 509
 23. *Same*.—*Argument of Counsel*.—*Witness*.—*Evidence*.—The statement of the counsel in the closing argument, that a witness was not disinterested, is not beyond the scope of a legitimate discussion, and where a paper, the contents of which were not read, was admitted to have been delivered to the plaintiff as containing a statement of the amount of taxes due upon the land, a statement in the closing argument that such paper had been delivered was not improper. *Ib.*

PRESUMPTION.

See HIGHWAY; RAILROAD, 14, 17; TRUST AND TRUSTEE.

PRINCIPAL AND AGENT.

See DEED, 4; MARRIED WOMAN, 3, 4; RAILROAD, 12.

PRINCIPAL AND SURETY.

See APPEAL BOND; COUNTY AUDITOR; COUNTY TREASURER; JUDGMENT, 2.

Subrogation. — Pleading. — Denial. — Set-Off. — Harmless Error.—Suit by a surety against his three principals, alleging that he had with them, and as their surety, executed a note which he had been compelled to pay; that one of the principals had assigned to the creditor a decree of foreclosure as collateral security for the same debt, receiving from the creditor a written agreement showing the purpose of the assignment, which agreement had been assigned to the plaintiff. Prayer for personal judgment, and to be subrogated to the rights both of the plaintiff in the decree and of the bank therein. Answer by two of the three principals: 1. General denial. 2. That the assignment to the plaintiff of the written agreement was without consideration. 5. That the principal debtors had delivered to the plaintiff a great and sufficient amount of property to enable the plaintiff to pay this debt and other debts of theirs which he agreed to pay, all which he refused to pay, but converted the property to his own use. 6. An indebtedness of the plaintiff to these two defendants, as a set-off.

Held, that the second defence was bad as an answer to the whole complaint, because it answered only a part.

Held, also, that the matter alleged in the fifth was admissible under the general denial, as tending to show that the plaintiff was not surety but principal debtor, and therefore it was a harmless error to hold it bad on demurrer.

Held, also, that the sixth (set-off) was bad for want of mutuality, inasmuch as one of the principal debtors, a defendant, was not shown to have any interest in the demand pleaded as a set off.

First Nat'l Bk. v. Nugen, 160

PROMISSORY NOTE.

See PRINCIPAL AND SURETY; VENDOR'S LIEN, 5.

1. *Judgment.—Joint and Several Contract.—Merger.*—A judgment against one of several makers of a joint and several note does not merge the note or work the release of the other makers. *Giles v. Canary, 116*
2. *Consideration. — Evidence.*—The consideration and terms upon which a note was given and accepted, whether to satisfy a debt or as evidence of it, may be shown by parol. *First Nat'l Bk v. Nugen, 160*
3. *Pleading.—Exhibit.—Defect not Cured by Verdict.*—Where a complaint on a promissory note does not set out such note, nor aver that a copy is filed with the pleading, it is bad on demurrer, and if objection is made by demurrer, the defect is not cured by verdict.

Rairden v. Winstandley, 600

PROSECUTING ATTORNEY.

See CRIMINAL LAW, 4, 14.

Circuit Court.—Power to Appoint Attorneys to Assist Prosecuting Attorney.—Liability of County.—The circuit court has inherent discretionary power to appoint attorneys to assist the prosecuting attorney in criminal causes, and to allow compensation, payable out of the county treasury, nor will its action be reviewed save in cases where a clear abuse of discretion appears.

Tull v. State, ex rel., 238

PUBLIC POLICY.

See COUNTY AUDITOR.

PUBLIC RECORD.

See EVIDENCE, 1, 2.

QUIETING TITLE.

See FRAUDULENT CONVEYANCE, 1, 2; INFANT, 2, 3; MARRIED WOMAN, 2; NEW TRIAL, 3 to 5; PARTITION, 1, 2; TAXES, 11.

1. *Cross Complaint.—Verified Answer Denying Execution of Deed.—Burden of Issue.*—Where, in an action to quiet the title to real estate, the defendant, by way of cross complaint, asserts that he is the owner of such real estate, and that the plaintiff's claim thereto is unfounded and a cloud upon his title, which he asks to have quieted, and the plaintiff answers such cross complaint, denying under oath the execution of the deed under which the cross complainant claims to derive title, and the record shows that the issue thus joined was the issue tried below, the burden of such issue rests upon the cross complainant, without shifting or change, throughout the trial. *Fitzgerald v. Goff, 28*
2. *Same.—Requisites of Deed.—Instruction.*—In section 2919, R. S. 1881, it is provided that the conveyance of real estate "shall be, by deed in writing, subscribed, sealed, and duly acknowledged by the grantor or his attorney." An instruction, substantially in the language of the statute, is not an available error, where the controversy in relation to the execution of the deed is not between the grantor and the grantee, or one having actual notice of such deed. *Ib.*
3. *Same.—Acknowledgment.*—Where one of the controverted questions on the trial of a cause is in relation to the acknowledgment of a deed, an instruction as to how and by whom an acknowledgment may be taken is not erroneous. *Ib.*
4. *Complaint.—Description of Lands.*—A complaint to quiet title, describing the land thus, "commencing at the northeast corner of section" (giving number, town, and range), "thence south about 100 rods to a stone established by the county surveyor, thence west 24 rods, thence south 4 rods, thence west 56 rods to middle dividing line of north-east quarter of said section, thence north on said line to the north line of said section, thence east to the place of beginning," gives a definite description. *Pitcher v. Dove, 175*
5. *Same.—Deed.—Evidence.—Estoppel.*—A deed of lands describing the first line as running from the same initial point "south one hundred rods," and otherwise corresponding with the complaint, shows no title beyond the distance of 100 rods; but if the stone mentioned in the complaint be still farther south, and the plaintiffs, ignorant of the matter, have been induced to purchase, by a device of the defendant who had knowledge, relying upon his representations that the first line of the tract extended south to the stone, the latter will be estopped in equity to dispute the fact. *Ib.*
6. *Same.*—In such case parol evidence is admissible to establish the facts which create an estoppel. *Ib.*
7. *Same.—Real Estate.—Title.—Acquisition by Estoppel.*—Title to land may be acquired by an estoppel in pais. *Ib.*
8. *Trial by Jury.*—In a suit to quiet title under the statute, trial by jury must be had if demanded, the action being a creature of the statute and not existing prior to June 18th, 1852. *Trittipo v. Morgan, 269*
9. *Same.—Will.*—Where a will is a link in a chain of title in question, it is admissible in evidence in support of such title. *Ib.*
10. *Possession.—Complaint.—Demand.*—Under section 1070, R. S. 1881, any person claiming title to real property, "either in or out of possession," may bring an action to quiet such title; and, therefore, it is not necessary to allege in the complaint, in such action, either that the plaintiff

is entitled to the possession, or has demanded possession, before the commencement of the suit.

McCasin v. State, ex rel., 428

11. *Complaint.*—A complaint to quiet title, alleging that the defendant who was once seized of the land gives out in public speeches falsely, that her conveyance thereof was made when she was an infant, and that she was still the owner, whereby the plaintiff's title was clouded, is good on demurrer.

Sims v. Smith, 469

RAILROAD.

1. *Killing Stock.—Complaint.*—In an action, under the statute, against a railroad company, for killing stock, the want of a formal averment in the complaint, that the plaintiff was damaged by the killing of his cattle, will be unavailing for any purpose after verdict.
Louisville, etc., R. W. Co. v. Peck, 68
2. *Same.—Damages.—Evidence.*—Upon the question of damages, it is proper to allow witnesses to testify as to the value of animals before and after the injury. *Ib.*
3. *Killing Stock.—Fencing.—Highway.*—Where cattle enter upon the track of a railroad at a highway, at a place where it is the duty of the company to maintain a fence, and are killed or injured, the company is liable if there was no secure fence.
St. Wayne, etc., R. R. Co. v. Herbold, 91
4. *Same.*—If the place is one that can not be fenced without interfering with the business of the company in the discharge of its duty to the public, or is one which can not be fenced without interfering with the use of a highway, or where a fence would endanger the safety of employees in the management and running of its locomotives and trains, the company is not required to fence. *Ib.*
5. *Same.—Cattle-Guards.*—Where cattle guards are necessary to prevent animals from entering upon the track from a highway, and fences can not be maintained, it is the duty of the company to maintain proper cattle-guards, provided it does not interfere with the duty the company owes to the public and the safety of its employees. *Ib.*
6. *Same.—Burden of Proof.*—In an action for damages for stock killed, the burden of showing that the place is one which can not be fenced, under the above conditions, is upon the railroad company. *Ib.*
7. *Same.—Liability.*—Where, at a highway crossing, cattle-guards are placed sixty feet from the boundary of the highway, and it is not shown by the railroad company that the guards, if placed at the boundary of the highway, would interfere with the use of the highway or endanger the safety of persons operating or managing the trains, or would obstruct the transaction of the company's business, or the discharge of its duty to the public, it is liable under the statute for animals killed by its engines or cars, and which entered upon its track from the unfenced space between the highway and the cattle-guards. That it would be difficult or expensive to enclose is no excuse. *Ib.*
8. *Fencing.*—If the circumstances are such as to justify a failure to fence one side of a railroad track, none is required on the other side, as where on one side freight is loaded and discharged, and there is a saw-mill and grain elevator from which lumber and grain are laden on the cars for shipment. *Wabash, etc., R. W. Co. v. Nice, 152*
9. *Same.—Killing Stock.—Contributory Negligence.*—One who voluntarily permits his cattle to run at large near a railroad, where it is not required to be fenced, is guilty of contributory negligence, if the cattle stray upon the track and are killed by the negligent management of a train of cars passing upon the railroad, and he can not recover. *Ib.*
10. *Negligence.—Pleading.*—A complaint against a railroad company for

killing cattle upon a highway crossing, by reason of negligent failure to sound the whistle and ring the bell, as the statute requires, without any negligence of the plaintiff, is good.

Cincinnati, etc., R. W. Co. v. Hiltzhauser, 486

11. *Same.—Negligence of Plaintiff.—Cattle at Large.*—Where, in such case, it appears by evidence that the plaintiff's cattle were running at large, and it is not shown that there was an order of the county board allowing cattle to run at large, a verdict for the plaintiff will be set aside. *Ib.*
12. *Principal and Agent.—Liability for Acts of Agent.—Torts.*—Where a railroad company employs an agent to detect, arrest and prosecute persons who unlawfully obstruct its track, and the agent, acting in the scope of his employment, arrests an innocent person, the railroad company is liable therefor. *Evansville, etc., R. R. Co. v. McKee, 519*
13. *Negligence.—Defective Bridge.—Pleading.*—In a suit against a railroad company for injury resulting from its negligence, an express averment that the plaintiff was guilty of no contributory negligence is not necessary, if that fact otherwise appears, *e. g.*, as where it is averred that while the plaintiff, being a passenger, was seated in the defendant's coach, the coach, by reason of the defendant's negligence, broke through a bridge, whereby, *etc.*
Bedford, etc., R. R. Co. v. Rainbolt, 551
14. *Same.—Care Required to Protect Passengers.—Presumption.—Evidence.*—Proof that a railroad passenger was injured by the train breaking through a bridge raised a presumption of negligence by the carrier, which may be rebutted by proof. The slightest negligence in such case imposes liability, the care required being the greatest that is practicable in keeping the machinery and bridges in safe condition, consistent with what are the known means of attaining that end. *Ib.*
15. *Same.—Instruction.*—In the absence of proof that the safety of a properly constructed railroad bridge may depend upon the soundness of a single iron rod, the jury should not be instructed that if the bridge broke down because of a defect in such single rod, which was not discoverable, and the injury resulted therefrom, there could be no recovery. *Ib.*
16. *Appropriation of Land.—Description.—Amendment.*—Under section 3909, R. S. 1881, the court has power, during the pendency of a proceeding by a railroad company to condemn land for the right of way of its road, to permit the plaintiff to amend the description of the land so condemned, as set forth in the article of appropriation and in the proceedings thereunder. *Hunt v. The New York, etc., R. W. Co., 593*
17. *Same.—Supreme Court.—Presumption.—Damages.*—In such case the Supreme Court will presume, in the absence of the evidence adduced at the trial, that if the quantity of land appropriated was augmented, or the damages of the owner were increased, by means of such amendment, these facts were considered by the jury in making their assessment. *Ib.*

REAL ESTATE.

See APPEAL BOND, 1; CITY, 2 to 5; DEED; DIVORCE, 3; DRAINAGE, 2; EJECTMENT; FRAUDULENT CONVEYANCE; JUDGMENT, 3, 4; MARRIED WOMAN; MORTGAGE; PARTITION; QUIETING TITLE; RAILROAD, 16; RECEIVER, 2; SUBROGATION; TAXES; VENDOR AND VENDEE; VENDOR'S LIEN; WILLS, 1.

REAL ESTATE, ACTION TO RECOVER.

See APPEAL BOND; DEED, 5; EJECTMENT.

RECEIVER.

See TIME.

1. *Mortgage.—Foreclosure.—Practice.*—In a suit to foreclose a mortgage, a receiver is appointed on motion or petition therefor, and on such application the complaint can not be questioned by demurrer or otherwise. The application may be heard on affidavits or oral testimony, and much in the discretion of the court, and an exception to granting or refusing the motion saves the question for appeal; and erroneous statements in such affidavits may be corrected by additional affidavits. *Hursh v. Hursh, 500*
2. *Same.—Statute Construed.*—The statute, R. S. 1881, section 1222, warrants the appointment of a receiver in a suit to foreclose a mortgage, without reference to the solvency of the mortgagor, when it appears that the mortgaged property is not sufficient to satisfy the debt, and he may be authorized to take possession of the land and crops growing thereon, though the mortgagor be at the time in possession. *Id.*

RECORD.

See AGREED CASE; ATTACHMENT; EVIDENCE, 1, 2; PARTITION, 6, 8, 9; PRACTICE, 13; SCHOOL SUPERINTENDENT, 2; SUPREME COURT, 2, 4, 5.

REDEMPTION.

See JUDGMENT, 1.

REFEREE.

See PRACTICE, 14.

RELATIONSHIP.

See CITY, 6, 7.

RELEASE.

See JUDGMENT, 2; PROMISSORY NOTE, 1.

RENT.

See APPEAL BOND.

REPEAL OF STATUTE.

See DRAINAGE, 3.

REPLEVIN.

1. *Parties.—Pleading.*—In replevin parties can not, with any propriety, be made defendants merely because they claim "some interest" in the property in controversy, but have none, and a general denial by such defendants makes no issue to try. *Van Gorder v. Smith, 404*
2. *Judgment.*—Where there is no judgment for the return of the property replevied, there can be no judgment for its value. *Foster v. Bringham, 505*
3. *Parties.—Suit on Replevin Bond.—Waiver.*—Where a replevin bond is executed to a sheriff and execution plaintiff jointly, and an action thereon is subsequently brought by the execution plaintiff alone, the defect of plaintiffs will be waived by the failure of defendants to demur therefor. *Id.*

RES ADJUDICATA.

See JUDGMENT, 4, 6; PARTITION, 7; VENDOR'S LIEN, 4.

RES GESTÆ.

See CRIMINAL LAW, 2; VENDOR AND VENDEE, 9, 12.

RULE OF COURT.

See PRACTICE, 19; SUPREME COURT, 14.

SALE.

See BAILMENT; EXECUTION, 3, 4; INTOXICATING LIQUOR; MORTGAGE, 2; PARTITION, 4 to 9, TAXES; VENDOR AND VENDEE, 7.

Bill of Sale.—*Assignment for Benefit of Creditors.*—*Fraud.*—A writing, by which an insolvent merchant transfers his entire stock in trade and notes and accounts to a creditor, providing that when turned into money any proceeds beyond satisfying the creditor shall be paid to the merchant, is not an assignment under the statute, but is a bill of sale, and is not fraudulent in law. *Dessar v. Field, 548*

SCHOOL FUND.

See COUNTY AUDITOR.

SCHOOL SUPERINTENDENT.

1. *County School Superintendent.*—*Term of Office.*—A county superintendent of public schools, properly elected and qualified, will hold the office until his successor is elected and qualified. *State, ex rel., v. Sutton, 300*
2. *Same.*—*Record of Election.*—*Evidence.*—The record of such election, made by the county auditor, is *prima facie* correct, and is *prima facie* evidence of such election. *Ib.*
3. *Same.*—*Election.*—*Ballots.*—*Testimony of Trustees.*—When the township trustees agree that the election of such superintendent shall be by secret ballot, the election will be determined by the ballots actually cast, and in a suit regarding the validity of such an election the ballots are the best evidence, but when they have been lost, it is proper for the jury to consider the testimony of the trustees who cast the ballots, and of those who counted them and announced the result. *Ib.*
4. *Same.*—*Instructions.*—The court should not charge, as a matter of law, that the testimony of the trustees casting the ballots is the best evidence, in the absence of the ballots. *Ib.*
5. *Same.*—*Trustees.*—*Acquiescence in Announcement.*—Where the trustees agreed that the election should be by ballot, adhered to that mode throughout, and at the time the result was announced supposed the result was correctly announced, it was error to charge the jury that if the trustees adjourned without objection, an acquiescence in the result might be inferred, and that such an acquiescence would amount to an election. *Ib.*

SEIZIN.

See DEED, 6.

SELF-DEFENCE.

See CRIMINAL LAW, 20 to 22.

SET-OFF.

See PRINCIPAL AND SURETY.

SHELLEY'S CASE.

See WILLS, 1, 5.

SHERIFF.

See EXECUTION, 3, 4; PARTIES; PARTNERSHIP, 2.

SHERIFF'S SALE.

See EXECUTION; JUDGMENT, 3; MORTGAGE, 2; PARTITION, 7.

SIGNATURE.

See PRACTICE, 1.

SPECIAL FINDING.

See CITY, 10; NEGLIGENCE, 2; NEW TRIAL, 2; PARTITION, 7; PRACTICE, 2, 7, 10; SUPREME COURT, 16.

1. *Exceptions.—Practice.*—Where the court finds the facts specially and states conclusions of law thereon, exceptions to the latter, not taken until after a motion for a new trial has been made and overruled, come too late to present any question. *Smith v. McKean, 101*
2. *Same.—Modification of Judgment.*—In such case, a motion to modify the judgment so that it would be inconsistent with the conclusions of law should be overruled. *Id.*
3. *Practice.—Conclusions of Law.—Exceptions.*—Where the court, at the request of one or more of the parties, makes a special finding of the facts and states thereon its conclusions of law, and the party objecting thereto merely saves an exception to the conclusions of law, and does not move either for a new trial or for a *venire de novo*, on appeal he admits that the facts are fully and correctly found, and the error, if any, is predicated solely upon the court's application of the law to the facts so found. *Schindler v. Westover, 395*
4. The court must make a special finding of the facts with its conclusions of law thereon when properly requested; but such request must be shown by an order book entry, by bill of exceptions or by the finding itself. *Smith v. Uhler, 140*

SPECIAL VERDICT.

See VERDICT, 1.

STATE'S REAL ESTATE.

See EJECTMENT, 2; TAXES, 10.

STATUTE CONSTRUED.

See APPEAL BOND; COURTS, 3; MORTGAGE, 7; RECEIVER, 2; TAXES, 9.

STATUTE OF FRAUDS.

See MARRIAGE; TRUST AND TRUSTEE.

1. *Refusal to Reduce Contract to Writing.*—The statute of frauds can not be used to cover the perpetration of a fraud, but the simple refusal of a party to have the contract reduced to writing is not such a fraud as takes it out of the statute. *Caylor v. Roe, 1*
2. *Same.—Pleading.*—The facts constituting fraud must be pleaded. *Id.*

STATUTE OF LIMITATIONS.

See TRUST AND TRUSTEE.

Agreement.—Where a life insurance policy is taken by a husband upon his life, payable to his wife or her assigns, and she assigns it to secure a debt of the husband, upon agreement that no proceedings shall be taken to enforce collection thereof during the husband's life, the statute of limitations does not commence to run against the debt so secured from the assignment, until his death.

Damron v. Penn, etc., Ins. Co., 478

STATUTES.

See DRAINAGE, 3.

STREET.

See CITY, 1, 6 to 10.

SUBROGATION.

See MORTGAGE, 2, 9; PRINCIPAL AND SURETY.

Satisfied Mortgage.—Purchaser for Value of Judgment.—Equal Equities.—The equity of the purchaser for value of a judgment, which is a lien upon certain real estate, is at least equal to the equitable claim of the owner of such real estate to be subrogated to the rights of the mortgagee in a mortgage thereon, which had been paid off and satisfied, and of which

the purchaser of the judgment had no actual knowledge, and where the equities are equal the law must prevail. *Ritter v. Coel*, 80

SUNDAY.

See INTOXICATING LIQUOR, 1.

SUPREME COURT.

See AGREED CASE; ASSIGNMENT OF ERROR; CRIMINAL LAW, 7, 10 to 13; FRAUDULENT CONVEYANCE, 8; INSTRUCTIONS TO JURY, 1, 4, 8, 9; JURY; MECHANIC'S LIEN; PRACTICE, 1 to 3, 10, 16; RAILROAD, 17; WITNESS, 8.

1. *Witness.—Weight of Evidence.*—The weight of evidence and the credibility of witnesses are questions for the jury and the trial court, and the Supreme Court will not reverse a judgment on either of these grounds. *Fitzgerald v. Goff*, 28
2. *Evidence.—Witness.—Record.—Exception.*—An exception to the ruling of the trial court, in refusing to permit a party to put a question to his own witness, presents no question in the Supreme Court unless the record shows the evidence intended to be elicited, and that the court was informed thereof. *Bauer v. Indianapolis*, 56
3. *Evidence.—Weight.—Credibility.*—The Supreme Court will not weigh conflicting evidence, nor determine as to the credibility of witnesses. *Giles v. Canary*, 116
4. *Practice.—Reversal of Judgment.*—Where the judgment below rests upon a complaint of two or more paragraphs, to one of which the trial court has erroneously overruled a demurrer for the want of sufficient facts, and the record does not affirmatively show that such judgment rests exclusively upon the good paragraph or paragraphs, it will be reversed by the Supreme Court. *Logansport v. La Rose*, 117
5. *Practice.—Record.—Bill of Exceptions.*—Without a bill of exceptions, or order of court, to bring the necessary papers upon the record, motions in the court below to strike out pleadings and papers, or to separate causes of action, can not be considered by the Supreme Court. *Furnacht v. German, etc., Ass'n*, 133
6. *Evidence.—Bill of Exceptions.*—Where it is apparent upon the face of a bill of exceptions, that all the evidence is not in it, a statement that it does contain all is of no avail. *Id.*
7. *Same.—New Trial.*—Where it was assigned as cause for a new trial, that a witness was allowed to testify as to "usages and customs" of an association; also, that evidence of amendments to its constitution and by-laws was admitted, and no such amendments appear as evidence in the bill of exceptions, nor any evidence of "usages and customs," but only of facts from which an inference might or might not be drawn as to such usages, no question is presented to the Supreme Court concerning the matter. *Id.*
8. *Bill of Exceptions.—Evidence.*—To present for review the admission of evidence objected to, it is not necessary that the bill of exceptions shall contain all the evidence given upon the trial. *Hedrick v. D. M. Osborne & Co.*, 143
9. *Practice.—Judgment.—Exceptions.—Bill of Exceptions.*—Without a bill of exceptions showing specific objections, an exception to the form or substance of a judgment presents no question in the Supreme Court. *Penn. Co. v. Niblack*, 149
10. *Excessive Damages.*—The Supreme Court will not reverse for excessive damages given by general verdict, nor for erroneous instructions concerning the subject of damages and inducing the excess, if in answer to interrogatories the jury has found all the facts, so that the proper

damages can be computed, but will affirm on condition that the appellee remit the excess. *Rogers v. State, ex rel., 218*

11. *Weight of Evidence.*—Whether a cause be at law or in equity, the Supreme Court will not reverse on the weight of the evidence. *State, ex rel., v. Wasson, 261; Miller v. Evansville Nat'l Bank, 272*
12. *Motion to Tax Costs.—Bill of Exceptions.—Practice.*—Where the grounds of a motion to tax costs, and the exception to a ruling thereon, are not shown by a bill of exceptions, no question is before the Supreme Court in relation to the ruling. *Gallimore v. Blankenship, 350*
13. *Same.—Weight of Evidence.*—If the evidence is conflicting, the Supreme Court will not undertake to determine the preponderance. *Ib.*
14. *Certiorari.—Notice.—Practice.*—A motion in the Supreme Court for a certiorari, after submission, will be heard after ten days' notice under rule 37, though the notice specify an earlier day. *Durbin v. Haines, 463*
15. *Practice.—Weight of Evidence.*—The Supreme Court will not disturb the finding nor reverse the judgment of the trial court on the weight of evidence. *Lord v. Wilcox, 491*
16. *Harmless Error.*—Where the facts are specially found by the trial court, and no objection is made to the finding, and it appears that, upon the facts so found, the judgment is clearly right, such judgment will not be reversed for intermediate errors. *Foster v. Bringham, 505*

SWAMP LAND.

See EVIDENCE, 3.

TAXES.

See CITY, 2 to 5.

1. *Tax Deed.*—Where it is not shown that the person bound for taxes has no personal property, a tax deed will not convey title. *Pücher v. Dove, 175*
2. *Complaint to Set Aside Sale of Land.*—A complaint to set aside a sale of land for taxes legally assessed, on the ground that the land was sold without being advertised, and while the owner had sufficient personal property with which to pay the taxes, is insufficient upon demurrer unless it is also averred that the plaintiff has paid the taxes or offers to pay them. *Peckham v. Millikan, 352*
3. *Same.*—This rule applies in controversies between the land-owner and the purchaser. *Ib.*
4. *Same.—Priority of Liens.—Mortgage.—Purchaser at Foreclosure Sale.*—Taxes assessed against the owner of the equity of redemption become a lien upon the land superior to the lien of a prior mortgage given for purchase-money, and where such mortgage is foreclosed, and the land purchased under such decree, by the mortgagee, he takes it charged with such taxes. *Ib.*
5. *Same.—Assessment in Another than Owner's Name.*—The assessment of taxes upon the owner's land in another's name does not impair the assessment. *Ib.*
6. *Same.—Personal Property.*—The assessment of taxes for personal property becomes a lien upon the land of the owner in the county. *Ib.*
7. *Same.—Misdescription of Land.—Lien.*—A misdescription of land assessed does not destroy the lien of the State for taxes, and a sale of such land for taxes by such misdescription will transfer the lien of the State to the purchaser. *Ib.*
8. *Same.—Private Sale.*—A private sale of land for taxes, after notice as required by the statute, will transfer the lien of the State to the purchaser. *Ib.*

9. *Same.—Statute Construed.*—A purchaser of land for taxes under the act of December 21st, 1872, where the title proves invalid, is only entitled to a lien for the purchase-money, and all subsequent taxes paid by him, at the rate of twenty per centum, under the 3d and 4th sections of the act of March 5th, 1883, which govern such cases. *Ib.*
10. *Sale of State's Land for.—Deed.—Void.*—The sale and conveyance of land owned by the State, for delinquent taxes assessed thereon, are invalid and void, because the State's land is not subject to taxation.
McCaslin v. State, ex rel., 428
11. *Quieting Title.—Sale for Taxes.—Description.—Mistake.—Complaint.—Demurrer.*—Where, in a suit by the grantee in a tax deed to quiet his title to certain described land previously sold for delinquent taxes, the plaintiff avers, among other things, that such land had been by mistake entered upon the tax duplicate by a description so indefinite and erroneous that the tax deed conveyed no title thereto, but that such description was intended to apply to and cover the land in suit, his complaint is sufficient on demurrer to entitle him, as such grantee, to the remedy against the land intended to be taxed and sold, provided in section 257 of the act of December 21st, 1872, for the assessment and collection of taxes, 1 R. S. 1876, p. 129. *Cooper v. Jackson, 566*
12. *Same.—Partial Answer.—Merger.—Mortgage Debt.*—A paragraph of answer, which is expressly limited to a specific part of the complaint, is not bad on demurrer merely because it fails to answer the whole complaint, nor is there any such merger of the debt secured by mortgage, in the decree foreclosing such mortgage, as will make it error to describe such debt as a mortgage debt, or as will invalidate an agreement to assume and pay the debt by that description. *Ib.*
13. *Same.—Sale for Taxes.—Purchase by Mortgagor or his Grantee.—Payment.*—The mortgagor of land, or his grantee remaining in possession, owes a duty to the mortgagee to keep down the taxes, and if he, unmindful of his duty, allows the taxes to become delinquent, and directly or indirectly purchases the land for such taxes, such purchase operates only as a payment of such taxes, and the purchaser acquires no rights thereby as against the mortgagee. *Ib.*

TENANCY BY ENTIRETIES.

See HUSBAND AND WIFE, 1; JUDGMENT, 8; MORTGAGE, 3.

TENANTS IN COMMON.

See BAILMENT.

TICKETS.

See ELECTIONS; SCHOOL SUPERINTENDENT, 3 to 5.

TIME.

Appeal.—Receiver.—An appeal from an interlocutory order appointing a receiver was perfected July 25th, the order having been entered July 16th.

Held, that the appeal was within ten days as required by section 1231, R. S. 1881. *Hursh v. Hursh, 500*

TITLE.

See BAILMENT; DEED, 1 to 4, 6; EVIDENCE, 3; FRAUDULENT CONVEYANCE, 1, 2; JUDGMENT, 3, 4; PARTITION, 1 to 6; QUIETING TITLE; TAXES; VENDOR AND VENDEE, 3, 5 to 8.

TITLE BOND.

See VENDOR AND VENDEE, 3.

TORTS.

See RAILROAD, 12; TRESPASS.

TOWNSHIP TRUSTEE.

See SCHOOL SUPERINTENDENT, 3 to 5.

TRANSCRIPT.

See AGREED CASE, 4.

TRESPASS.

See ASSAULT AND BATTERY; RAILROAD, 12.

Husband and Wife.—Wife's Torts.—Joint Liability.—Damages.—Under the law of this State, prior to September 19th, 1881, husband and wife were jointly liable in damages for the wife's torts, where it appeared that she was the principal tort-feasor and committed the trespass complained of, not in company with nor by the order of her husband. *McCaslin v. State, ex rel., 428*

TRIAL.

See AGREED CASE; CITY, 8; FRAUDULENT CONVEYANCE, 1, 3; PARTNERSHIP, 3; PRACTICE, 5, 10, 11; QUIETING TITLE, 8.

TRUST AND TRUSTEE.

See BANKRUPTCY; DECEDENTS' ESTATES, 3; HUSBAND AND WIFE, 2; WILLS, 9.

Fraudulent Conveyance.—Agreement.—Statute of Frauds.—Statute of Limitations.—Demand.—Presumption.—Where one holds lands in secret trust for another, to defraud creditors, and by subsequent parol agreement the land is converted into money to be used by the trustee in paying the creditors, the balance to be put at interest until called for or until the grantor's youngest child reaches full age, the new agreement purges the original fraud, is valid though not in writing, the statute of limitations does not begin to run until demand by the *cestui que trust* or full age of the youngest child, and the lapse of twenty years raises no presumption of payment. *Langdale v. Woollen, 575*

TURNPIKE.

See NEGLIGENCE, 6, 7; WATERCOURSE, 1.

VARIANCE.

See JUDGMENT, 7; PARTITION, 8; PLEADING, 4.

VENDOR AND VENDEE.

See DEED, 5; EVIDENCE, 6; MORTGAGE, 8, 9; VENDOR'S LIEN.

1. *Real Estate.—Judgment Lien.—Notice.—Value of Improvements.*—The purchaser of real estate is affected with constructive notice of any judgment lien thereon, and if, without actual knowledge of such lien, he buys the real estate and makes valuable improvements thereon, it is his misfortune, and not the fault of the owner of the judgment, and he is not entitled to be repaid the value of such improvements before the lien of such judgment can be enforced. *Ritter v. Cost, 80*
2. *Same.—Execution.—Sale in Parcels.—Enforcement of Lien Against Parcels.—Rule in Equity.—Sheriff's Duty.*—Where real estate, which is subject to the lien of a judgment, is sold and conveyed in parcels to different purchasers at different times, and afterwards an execution is sued out for the enforcement of such judgment lien, it is the duty of the proper sheriff, in analogy to the rule in equity in like cases, to offer for sale the several parcels of such real estate, in the inverse order in which the same had been previously sold and conveyed; and where this has been done, and there has been no sale for the want of

bidders, and the execution remains unsatisfied, it then becomes the duty of the sheriff to offer and sell, if he can, the parcel of such real estate first sold and conveyed, and the sale thus made by the sheriff is legal and valid. *Ib.*

3. *Title-Bond.—Breach.—Failure of Title.*—The breach of a condition in a title-bond to execute a warranty deed constitutes a cause of action, though it be stipulated in the bond that "the grantee agrees to accept the property with the understanding that he is to get possession of the tenant in possession." *Junk v. Barnard, 137*
4. *Same.—Damages.*—In such case, damages to the extent of the purchase-money paid, with interest at 6 per cent. per annum, can not be deemed excessive. *Ib.*
5. *Deed.—Covenants.—Breach.—Practice.—Damages.—New Trial.*—In an action upon a covenant in a deed against encumbrances, no question arises as to the amount of the recovery, unless a new trial is asked either upon the ground that the damages assessed are excessive, or that there was error in the amount of the recovery. *Morehouse v. Heath, 509*
6. *Same.—Encumbrances.—Payment.—Recovery.*—The conveyance of land by a deed with general covenants entitles the vendee to recover such sum from the vendors as he was compelled to pay in extinguishment of such encumbrance, unless the vendee assumed the payment of such encumbrance as a part of the purchase-money. *Ib.*
7. *Same.—Mortgage.—Foreclosure.—Sale.—Title.*—Where land is thus conveyed, and the same and other land are encumbered by a mortgage which is subsequently foreclosed and the title conveyed thereunder to another, the vendee in such conveyance is entitled to recover from the vendors such reasonable sum as he has been compelled to pay to extinguish such title to his land. *Ib.*
8. *Same.—Instruction.—Extinguishment of Encumbrance.*—An instruction to this effect is not faulty because it fails to inform the jury that if such title is not extinguished by such payment, substantial damages can not be recovered. If such fact is deemed essential and not proved, the defendant should prepare and request the proper instruction. *Ib.*
9. *Same.—Agreement.—Evidence.—Res Gestæ.—Lien.*—In such case, an agreement made between the purchaser, at such foreclosure sale, and the vendee, in relation to the conveyance of such land by the former to the latter, upon payment of his proportion of the debt, is admissible in evidence as part of the transaction whereby such encumbrance was extinguished. *Ib.*
10. *Same.—Evidence of Assumption of Encumbrance.*—In such case, evidence that the vendee was upon the land before its purchase, knew for what purposes it was specially adapted, and knew it was of much greater value than the contract price, is not admissible to show that he assumed as part consideration of the purchase the encumbrance in question. *Ib.*
11. *Same.—Statements.—Hearsay.*—Statements made by one of the parties to a controversy, in the absence of the other, as to the terms of their contract, are mere hearsay evidence, and are not admissible as against the other party. *Ib.*
12. *Same.—Res Gestæ.*—Such statements made by the defendant at the time he employed an attorney to remove the encumbrance is not a part of the *res gestæ*, and is therefore not admissible to rebut such inference as grows out of such act. *Ib.*
13. *Same.—Consideration of Conveyance.*—A memorandum of the various amounts that composed the consideration of a conveyance, made by one party in the presence of the other at the time of such conveyance,

is admissible in evidence for the purpose of showing what was the real consideration of such conveyance. *Ib.*

14. *Same.—Possession of Tenant.*—The fact that the land at the time it was conveyed was in the possession of a tenant, and such fact was not mentioned in the deed, was not admissible in evidence for the purpose of showing that the vendee probably took the land subject to the encumbrance. *Ib.*

VENDOR'S LIEN.

1. *Enforcement of.—Complaint.—Demurrer.*—In a suit to enforce a vendor's lien on real estate, by the vendor against the heirs at law and personal representatives of the deceased vendee, the complaint is sufficient to withstand a demurrer thereto, for the alleged want of facts, if it be stated therein that the debt sued for is for the purchase-money, in whole or in part, of the real estate described, and that such debt remains due and unpaid. *Lord v. Wilcox, 491*
2. *Same.—Insolvency of Vendee.—Decree.*—Ordinarily, in such a suit, the complaint is sufficient without any averment of the vendee's insolvency, or that the vendee has no other property, subject to execution, whereof any part of the debt can be made. But where such an averment is not found in his complaint, the plaintiff is not entitled to a decree for the sale of the land in the first instance, to satisfy his debt, but only to a decree that if no other property of the defendant can be found subject to sale on execution, the land shall be sold to satisfy his debt. *Ib.*
3. *Same.—Administrator of Deceased Vendee.—Proper Party.*—Where, after the death of the vendee, suit is brought to enforce a vendor's lien, the administrator of the deceased vendee is a proper party defendant, and where such vendee, at the time of his death, is possessed of other property subject to execution, his administrator is also a necessary party defendant. *Ib.*
4. *Same.—Former Adjudication.—Estoppel.—Heir and Creditor.—Administrator's Petition.*—Where the vendor of real estate is an heir at law of the deceased vendee, and as such heir, and in no other character, is made a party to the petition of such decedent's administrator for an order to sell the real estate, the adjudication upon such petition will not estop the vendor, as a creditor of the decedent, from maintaining a suit for the enforcement of his vendor's lien on the real estate, for the general rule is, that judgments conclude the parties only in the character in which they sue or are sued. *Ib.*
5. *Same.—Waiver.—Acceptance of Notes of Third Persons.—Agreement of Parties.*—Ordinarily, the acceptance by the vendor of real estate of the notes of a third party for the amount of the unpaid purchase-money is a waiver of his equitable lien on the land as a security for the payment of such purchase-money; but it is competent for the parties to agree that, by his acceptance of such notes, the vendor does not waive his equitable lien on the land, and that the land is and shall continue to be good to the vendor, as a security for the payment of the purchase-money. *Ib.*

VENIRE DE NOVO.

See VERDICT, 2.

VERDICT.

See CITY, 10; INTERROGATORIES TO JURY; NEGLIGENCE, 2; PRACTICE, 7.

1. *Special Verdict.*—If a special verdict do not find facts sufficient to establish the issue in favor of the party having the burden, judgment goes against him. *Tritipo v. Morgan, 269*

2. *Venire de novo*.—*Answers to Interrogatories*.—Where the general verdict is in proper form, a failure of the jury to answer interrogatories does not authorize a *venire de novo*. *Bedford, etc., R. R. Co. v. Rainbolt, 551*

WAIVER.

See CITY, 7, PARTIES; PRACTICE, 4, 7; VENDOR'S LIEN, 5.

WAREHOUSEMAN.

See BAILMENT.

WATERCOURSE.

1. *Levee*.—*Injunction*.—*Easement*.—One may, by levees on his own land, protect it from overflow by floods, not, however, obstructing the channel of any stream; and for this purpose he may make his levee over the way of a turnpike company having an easement upon his land, not injuring the use of the way, and though his levee cause a greater overflow of water upon the land of others, and upon the turnpike elsewhere, his levee will be protected by injunction. *Shelbyville, etc., T. P. Co. v. Green, 205*
2. *Injunction*.—*Estoppel*.—Where the owner of a water power stands by, and, not objecting, permits a city, without first assessing and paying his damages, to erect works for a water supply by drawing water from the stream and thus diminishing his power, he creates an equitable estoppel, so that he will not be protected by injunction, but will be left to assert his rights at law. *Loyansport v. Uhl, 531*
3. *Same*.—*Pleading*.—Where, in such case, the general scope and prayer of the complaint shows that it was intended to obtain relief chiefly by injunction, it will, if not sufficient for that purpose, be held bad on demurrer, without considering whether it might be sufficient to warrant other relief. *Ib.*

WEIGHT OF EVIDENCE.

See FRAUDULENT CONVEYANCE, 8; JURY; MECHANIC'S LIEN; SUPREME COURT, 1, 3, 11, 13, 15.

WIDOW.

See WILLS, 9.

WILLS.

See DEED, 4; QUIETING TITLE, 9.

1. *Construction*.—*Rule in Shelley's Case*.—A devise of the rents and profits of lands to M. until his youngest child shall become of age, "upon the happening of which event the fee simple of said lands shall then vest absolutely in said M. and his heirs, and may by him or them be disposed of as he or they may judge best for his or their interest," vests in M. an estate in fee simple when his youngest child reaches full age, there being nothing in the context or situation of the parties plainly indicating a different intention. *Shimer v. Mann, 190*
2. *Same*.—*Changing Words*.—It is only in the clearest cases that courts will undertake to substitute or change the words of a will. *Ib.*
3. *Same*.—*Effect of term "Heirs"*.—When the term "heirs" clearly appears to be used as descriptive of a class who are to take as devisees, the fee will not vest in the first taker, but where the word is connected with the name of the first taker, it carries the fee, unless it clearly appears that it was not used in its ordinary legal signification. *Ib.*
4. *Construction*.—*Intention of Testator*.—The cardinal rule in the construction of wills is to ascertain and give effect to the intention of the testator, but, when purely technical terms are used, the technical meaning must be assigned them, unless the context clearly shows that the testator employed them in a different sense. *Ridgeway v. Lamphear, 251*

5. *Same.*—*Rule in Shelley's Case.*—The rule in Shelley's case is a law of property in this State, but it will not be allowed to override the manifest and clearly expressed intention of a testator; mere negative restraining words, however, will not defeat its operation. *Ib.*
6. *Same.*—*Right of Testator to Assign Meaning to Words.*—A testator has a right to assign a meaning to the words employed by him, and when that meaning is fully and clearly apparent, it will control and will take from the words their usual technical signification. *Ib.*
7. *Same.*—*Words "Heirs" and "Children."*—The word "heirs" may be construed to mean children, when it clearly appears that the testator intended it to have that meaning. *Ib.*
8. *Same.*—A devise of real estate by a testator to his son "during his natural life, and at his death to his children, if he have any, and if he have no children, or if there be no heirs of his body, then the real estate to his other heirs of his own blood equally, and if he die leaving a wife, his said wife to have a life-estate in said real property, said estate to terminate at her death," vests in the son, unmarried and childless at the testator's death, only a life-estate. *Ib.*
9. *Personal Property.*—*Construction.*—*Precatory Words.*—*Trust and Trustee.*—A bequest of personal property to the testator's wife, with power to use and control it as long as she may live, and at her death to dispose of it by will or otherwise, "if she be then my widow," with precatory words of recommendation, suggestion or desire as to sales, investment of proceeds and use of income therefrom in the care and education of children, and in advancing portions to them, as their habits and conduct may, in her judgment, be deemed proper, is a bequest to her of the property absolutely, subject to no trust whatever.
Van Gorder v. Smith, 404
10. *Revocation.*—*Destruction.*—*Insanity.*—The destruction of a will by the maker during a temporary fit of insanity is not an act done with his consent, and does not revoke it, nor, under the statute, R. S. 1881, section 2609, prevent its proof and establishment as one destroyed.
Forbing v. Weber, 588
11. *Same.*—*Probatng Will.*—*Evidence.*—*Copy.*—In proceedings to prove and establish a will destroyed, proof that the testator caused it to be recorded in the recorder's office, and that the record there found is a correct copy of the original, with evidence given by the attesting witnesses that the original was duly executed, is sufficient to show that the copy as recorded is a true copy, and it is then admissible in evidence. *Ib.*

WITNESS.

- See CRIMINAL LAW, 12, 13; DEED, 5; EVIDENCE, 6; HUSBAND AND WIFE, 5; PRACTICE, 21 to 23; RAILROAD, 2; SUPREME COURT, 1 to 3.
1. *Contradiction of Witness.*—*Impeachment.*—A party is not authorized to introduce evidence to sustain the moral character of his witness, whose testimony has been contradicted merely, where no attempt has been made to impeach the moral character or reputation of such witness.
Fitzgerald v. Goff, 28
 2. *Contradictory Statements.*—*Evidence of, for Impeachment only.*—The contradictory statements of a witness, introduced to impeach him, can only be considered for such purpose, and can not be regarded as substantial proof of the facts in dispute between the parties. *Allen v. Davis, 216*
 3. *Evidence.*—*Practice.*—The refusal to permit a party to put a question to his own witness is not available error, where the court has not been informed of the evidence expected to be elicited by the answer.
Sharpe v. Graydon, 238

4. *Cross-Examination.—Practice.*—On cross-examination a witness may be required to state particulars and details relative to material matters which he has stated generally, in chief, and it is error to refuse this right; and it is not necessary to inform the court of the facts expected to be developed by any such question. *Hyland v. Milner, 308*
5. *Same.*—On cross-examination, acts of the witness, relevant to the subject-matter of the action and inconsistent with his testimony may be shown, as affecting his credibility. *Id.*
6. *Evidence.—Practice.*—A question to a witness, so indefinite that the answer to it may, or may not, disclose matter not pertinent to the issues, may be allowed, or not, in the discretion of the court. *Metzler v. Metzler, 384*
7. *Impeachment.*—The impeachment of the character of a witness is only one of the modes of testing his credibility, and the court or jury may believe such witness notwithstanding his impeachment. *Overton v. Rogers, 595*
8. *Same.—Cross-Examination of Witness.—Discretion of Court.—Abuse of.—Supreme Court.*—How far the cross-examination of an adverse witness may be extended, in any case, is a question largely in the discretion of the trial court; and, unless the record shows an absolute abuse of such discretion, its exercise will not be reviewed by the Supreme Court. *Wuchstetter v. State, 290*
9. *Same.—Impeachment of Witness.—General Moral Character.—Cross-Examination.*—Under section 1803, R. S. 1881, in the impeachment of a witness, the subject-matter of the inquiry, whether upon the examination in chief or the cross-examination, is his general moral character; and where an impeaching witness has testified in chief that, as to one of the elements of moral character, the reputation of the party sought to be impeached is good, it is within the discretion of the trial court to allow such witness to be cross-examined in regard to the party's reputation as to any other or all of the essential and constituent elements of good moral character. *Id.*

WORDS AND PHRASES.

See WILLS, 3 to 8.

WRITTEN INSTRUMENT.

See CITY, 2; EVIDENCE, 5; PRACTICE, 14, 23; SALE; STATUTE OF FRAUDS; VENDOR AND VENDEE, 8.

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